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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 653

FARBENFABRIKEN BAYER A.G., *Petitioner*

v.

STERLING DRUG INC., *Respondent*

[Antitrust Case]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the Honorable Chief Justice of the United States and the Associates Justices of the Supreme Court of the United States:

Farbenfabriken Bayer A.G., petitioner herein, by its attorneys, prays that a writ of certiorari issue to the Court of Appeals for the Third Circuit to review the decision of that Court in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit affirming the decision of the District Court, but on different grounds, reported at 307 F.2d 210, is attached as Appendix A, p. 1a.

The opinion of the District Court for the District of New Jersey granted summary judgment in favor of respondent, reported at 197 F. Supp. 627, is attached as Appendix B, p. 8a.

JURISDICTION

This case seeks review of a Judgment of the United States Court of Appeals for the Third Circuit entered on August 9, 1962. A Petition for Rehearing was filed on August 24, 1962 and was denied on September 11, 1962.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where an illegal agreement has bound a large foreign corporation of world-wide reputation not to sell in the United States and not to use its trademarks or trade names in the United States, is it proper relief to the foreign corporation on dissolution of the illegal agreement, to permit it to use these trademarks and trade names in the United States, (of course, properly distinguished from the form in which those marks are used by the American partner to the illegal agreement)?

2. May petitioner, a German corporation with a long established and world-wide reputation under the name Bayer, be prevented from using its trademarks and

trade names in the United States by respondent owner of the American Bayer trademark, where such ownership is asserted in such a manner as to continue to effect some of the restraints of now dissolved agreements between the partners concededly illegal under the antitrust laws?

3. Does the *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 592 require respondent an American concern to avoid using its trademarks to exclude German petitioner from competition in the United States markets under its trademarks and trade names?

4. Is a German company, whose American subsidiary has been seized and sold by the Alien Property Custodian, entitled to compete in the United States with the acquirer of such subsidiary under the name under which it is known all over the world?

5. Is it a violation of the doctrine of this Court in *Timken* to construe an agreement by a foreign company consenting to the transfer of a trademark from one American subsidiary to another to give the acquiring subsidiary the power to prevent use of such trademark by the foreign parent in the United States market?

6. Was petitioner denied due process by the action of the Court of Appeals affirming the grant of respondent's motion for summary judgment on the sole basis of facts not presented in support of respondent's motion, and not relied on by the District Court, but conceded by petitioner solely for purposes of petitioner's cross-motion for summary judgment and which petitioner had no opportunity to contradict?

STATUTE INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209 (1890), 15 U.S.C. § 1 reads in pertinent part:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *"

STATEMENT OF THE CASE

Petitioner, Farbenfabriken Bayer A.G., is a corporation organized under the laws of the Federal Republic of Germany. It was established in 1953 as a successor of a part of the business formerly conducted by I.G. Farbenindustrie, A.G. (hereinafter referred to as I.G. Farben). I.G. Farben in 1925 had succeeded to the business conducted since 1863 by Farbenfabriken vorm.Friedrich Bayer & Co. (Stipulation 1, 2, App. 39a).[1]

Respondent in this action is Sterling Drug Inc., a corporation organized under the laws of Delaware. It is the legal successor to Sterling Products, Inc., Winthrop Chemical Company, Inc., and the Bayer Company, Inc., a New York corporation and former subsidiary first of petitioner and later of respondent which was merged into the respondent on December 1, 1942. (Stipulation 3, App. 39a).[2]

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[1] Petitioner, I. G. Farben, and Farbenfabriken vorm. Friedrich Bayer & Co., are hereinafter sometimes referred to individually or collectively as "petitioner" or as "German Bayer." While respondent denied the succession of petitioner to I. G. Farben such succession was assumed by the courts below and is not in issue on this petition.

[2] Sterling Drug Inc., and its predecessors or subsidiaries are hereinafter sometimes referred to either individually or collectively as "respondent" or as "Sterling."

Early Use of "Bayer" by Petitioner

During the period between about 1890 and World War I, German Bayer engaged in the sale of pharmaceuticals either directly or through subsidiaries in a large number of countries throughout the world, including the United States (Stipulation 25, App. 44a). In connection with this business, petitioner used the trademarks "Bayer" and "Bayer" spelled in a cross within a circle (herein called the "Bayer Cross"), and directly or through subsidiaries, was the owner of these trademarks in over forty countries, including the United States. (Afdvt., Exhibit A, App. 151a).

United States Distributing Agent

In the United States, German Bayer established in 1894, a wholly-owned subsidiary, Farbenfabriken of Elberfeld Company, to act as its distributing agent in the United States (Stipulation 4, App. 40a). Farbenfabriken of Elberfeld Company sold only pharmaceutical products manufactured by German Bayer and manufactured no pharmaceuticals on its own (Afdvt., Exhibit B, App. 152a). Farbenfabriken of Elberfeld Company used the Bayer trademarks only in connection with its business of distributing the products of German Bayer (Afdt., Exhibit B, App. 152a). It was on the basis of this use that in 1908 Farbenfabriken of Elberfeld Company was granted the United States registration of these trademarks (Stipulation 4, App. 40a).

In 1913, German Bayer dissolved Farbenfabriken of Elberfeld Company and transferred the business of selling its pharmaceuticals in the United States including Bayer trademarks to a newly-organized corporation, The Bayer Company, Inc. of New York (herein

referred to as New York Bayer), also a wholly-owned subsidiary. (Stipulation 5, App. 40a).

New York Bayer continued the business of distributing petitioner's products in the United States (Afdvt., Exhibit B, App. 152a). Like its predecessor, Farbenfabriken of Elberfeld Company, it used the Bayer trademarks only on goods manufactured by German Bayer, except that in or about 1915 New York Bayer began to manufacture a single product, aspirin, and to sell this product under the trademarks "Bayer" and "Bayer Cross." Previously the aspirin had been imported from Germany. With the exception of aspirin, however, the large line of pharmaceutical products sold by New York Bayer consisted only of products manufactured by petitioner in Germany (Afdvt. Exhibit B, App. 152a).

Sterling submitted, in defense of petitioner's motion for summary judgment, the minutes of a Board of Directors' meeting of New York Bayer indicating that in 1913 the Board authorized the execution of certain agreements between German Bayer and New York Bayer. Neither the execution or the performance of these agreements were proved by Sterling.[3]

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[3] The parties do not know whether the agreements were ever executed, and there is nothing in the record indicating whether, and to what extent, these agreements were actually carried out. The execution and performance of the agreements were assumed by petitioner solely for purposes of its own summary judgment, and petitioner urged that these agreements presented no obstacle to summary judgment but even supported such summary judgment. As shown under Point IV, *infra*, these agreements could therefore not properly be considered by the Court of Appeals in granting summary judgment against petitioner. The Court, however, not only considered the 1913 agreements, but treated them as dispositive of the case.

If such agreements were executed, German Bayer would have consented to the

> "sale, transfer, and assignment to Bayer Co., by the New York Corporation Farbenfabriken of Elberfeld Co., of the right for the sale in the United States and Canada of drugs, chemicals, pharmaceuticals and any and all other products *manufactured and (or) controlled* by Leverkusen . . ." [and] to "the sale, transfer and assignment by said Farbenfabriken of Elberfeld Co. to Bayer Co. of its (said Farbenfabriken of Elberfeld Co.'s) *trademarks*, good will and other assets and property." (App. 157a)[4]

and (2) German Bayer would have granted to New York Bayer

> "the sale and exclusive right for the sale within the United States : . . . of all its (Leverkusen's) products, whether dyes, drugs, pharmaceuticals or other . . ."

for a period continuing until 1921. (App. 158).

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[4] The preamble to the same form of agreement states as follows:

"The New York corporation Farbenfabriken of Elberfeld Co. has heretofore had and now has the rights for the sale in the United States and Canada of the dyes, chemicals, pharmaceuticals and other products manufactured and (or) controlled by Leverkusen. Bayer Co. has been organized for the purpose (among other things) of acquiring the said rights, and by corporate action had this day, has been authorized to negotiate for and acquire the trade-marks, good will and other of the assets and property of said Farbenfabriken of Elberfeld Co. Leverkusen is willing to permit Bayer Co. to acquire the said rights now and heretofore possessed by said Farbenfabriken of Elberfeld Co. upon terms and conditions by it (Leverkusen) agreed upon with Bayer Co."

Vesting of New York Bayer and Sale to Sterling

In January 1918, after the United States had declared war on Germany, the entire capital stock of New York Bayer was vested by the Alien Property Custodian and in December 1918 was sold to respondent (Stipulation 7, 8, App. 40a).

Respondent then divided the business of New York Bayer, insofar as is here relevant, into two parts. While New York Bayer continued the sale of aspirin under the Bayer trademarks the rest of the drug business formerly conducted by New York Bayer was transferred to a newly-organized corporation, Winthrop Chemical Company, Inc. (N.Y.), then a subsidiary of New York Bayer and later a subsidiary of Sterling (Stipulation 9, App. 41a, Afdvt. Exhibit B, App. 153a). Thus, after this transaction the name "Bayer" was used by respondent in the United States only in connection with the sale of aspirin (Afdvt., Exhibit C, App. 154a).

Winthrop, even though it was the owner of all the patents and trademarks which had been held in the name of New York Bayer, lacked the technical knowledge necessary to manufacture many of German Bayer's products which New York Bayer had distributed in the United States. (Afdvt. Exhibit B, App. 152a, 153a)

The 1923 Agreements

In April 1923 petitioner entered into a series of contracts with respondent and its subsidiaries, Winthrop and the New York Bayer (Stipulation 13, App. 41a). This series of contracts is herein referred to as the "1923 contracts." (Exhibits A, B and C to the Stipulation filed herein, App. 49a, et seq.) They are conceded

by both parties to be a violation of the Sherman Anti-trust Law. (Stipulation 18, App. 42a).

Exclusion From American Market

The basic agreement, the contract between New York Bayer and petitioner, hereinafter sometimes referred to as the "Bayer" contract (Exhibit B to the Stipulation, App. 58a), eliminated German Bayer as a competitor on the American market and contained a division of other markets between German Bayer and Sterling. As one important means of effectuating this arrangement the trademarks "Bayer" and "Bayer Cross" were allocated to Sterling in certain countries, including the United States. Pursuant to paragraph 2 and 3 of the agreement (App. 59a) petitioner agreed not to contest the title of New York Bayer in the trademarks "Bayer" and "Bayer Cross" in the United States, not to compete on the American market and not to license or permit other firms to use these marks in the United States in pharmaceutical and related fields. New York Bayer, on the other hand, agreed that it would use the Bayer trademarks only on aspirin and similar products (paragraph 26 of agreement, App. 67a). Under this agreement, German Bayer was completely excluded from the American market and Sterling was protected from any competition by German Bayer, both under the Bayer trademarks and under any other trademark.

Winthrop Shielded From Competition By German Bayer Products

In a further contract, this one between Winthrop, a wholly-owned subsidiary of Sterling, and German Bayer, herein sometime referred to as the "Winthrop contract" (Exhibit A to the Stipulation, App. 49a),

Winthrop obtained the right to exploit petitioner's patents, trademarks and know how, in the United States and was shielded from any competition by German Bayer in the sale of such products. The provisions of the agreement dealing with the trademarks "Bayer" and "Bayer Cross," identical to those in the "Bayer" contract discussed above, were not designed to protect Winthrop's right to the use of these trademarks (since it did not use them) but rather to prevent German Bayer from using these marks in competition with Winthrop.

Negative Use of Bayer Marks to Restrain Petitioner

To complete the arrangements Sterling promised not itself to use the trademarks "Bayer" and "Bayer Cross" in the United States but to limit the use of these marks to New York Bayer and Winthrop (Exhibit C to the Stipulation, App. 76a). Since Winthrop conducted its business under other trademarks the use of these marks were thereby effectively limited to New York Bayer, and it used them on only a single product, aspirin. Under the agreements, however, the marks were used negatively as a mechanism for shielding Winthrop from competition by petitioner.

These agreements, as amended and supplemented in 1926, were in substance performed by petitioner and respondent until sometime in the summer of 1941 (Stipulation 17, App. 42a).

Consent Decrees

On September 5, 1941, consent decrees were entered to complaints filed the same day by the Anti-Trust Division of the Department of Justice against respondent and certain of its subsidiaries or affiliates

in actions entitled *United States* v. *Alba Pharmaceutical Company* and *United States* v. *The Bayer Company, Inc.* Copies of the complaints and decrees are attached as Exhibits O, P, Q and R (App. 104a, et seq.) to the stipulation filed herein (Stipulation 22, App. 43a).

Sterling's Present Use of Bayer Marks to Restrain German Bayer

Sterling continues to use its control over the Bayer trademarks, which it uses only on aspirin[5] to prevent competition by German Bayer in the United States under some form of the Bayer name. Sterling thus keeps in force one of the restraints of the 1923 agreement—the shielding of Winthrop from competition by products bearing the better known "Bayer" name.[6]

German Bayer sells its large line of pharmaceutical products under the Bayer name and marks in many countries throughout the world (Stipulation 25, App. 44a).

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[5] Since the filing of this suit, Sterling began to use the marks also on nasal spray (Afdvt., Exhibit C, App. 154a).

[6] Sterling's determination to enforce these trademarks to their fullest extent is plainly evident. Thus, for example, Sterling has filed a counterclaim in this action (App. 136a) alleging an infringement of its trademarks by their use on calendars which allegedly contained some reference to German Bayer's pharmaceuticals. Sterling also filed in the same District Court (*Sterling Drug, Inc.* v. *Charles B. Harding, et al.*, Civil Action No. 882-52) a suit against Smith, Barney & Co., a company engaged in investment banking, charging that the use of the name "Bayer" and the "Bayer Cross" on a booklet providing information to potential investors in German Bayer's shares infringed its trademarks, because on a single page, in the middle of the pamphlet, mention is made of the fact that German Bayer is engaged in the manufacture and sale of pharmaceuticals.

PROCEEDINGS BELOW

The complaint in the present action was filed on September 28, 1955 (App. 6a). After a number of preliminary motions, on March 9, 1960, the parties, as a result of pre-trial proceedings entered into a detailed stipulation of fact (App. 39a).

On April 22, 1960 respondent filed a motion asking for summary judgment on the ground that the present suit is barred by the doctrine of laches (App. 148a). On January 17, 1961 petitioner filed a cross-motion for summary judgment to establish its right to use a form of the Bayer name with such distinguishing characteristics as might be necessary under the circumstances to avoid confusion (App. 148a). Oral argument on respondent's motion for summary judgment was had on July 20, 1960 and on petitioner's motion on February 15, 1961. On August 1, 1961 the District Court issued an opinion (Appendix B) granting respondent's motion for summary judgment and denying petitioner's cross-motion (App. 190a).

The Court of Appeals, on August 9, 1962, issued an opinion (Appendix A) affirming the decision of the District Court, but on entirely a different ground. While the District Court had ruled that petitioner's claims were barred by laches as requested by Sterling's motion, the Court of Appeals upheld the grant of summary judgment against petitioner on the merits, and as we shall see on the basis of assumed facts, not before the Court.

A petition for rehearing was made and denied on September 11, 1962.

REASONS WHY THE WRIT SHOULD BE GRANTED

This case presents an important and novel question involving the antitrust laws. It deals with the restoration of competitive conditions after the dissolution of an agreement in restraint of international trade. The American partner to the agreement retained power over the trademarks used under the agreements to effectuate a division of markets (under a consent decree with the Government to which its foreign partner was not a party). The American partner has continued to exercise this power to maintain in effect some of the restraints of the illegal agreement.

To secure a restoration of competitive conditions after the termination of the illegal division of market agreements between German Bayer and Sterling, petitioner seeks in this action the right to use the Bayer name and trademarks in connection with the sale of its pharmaceuticals in the United States free from interference by Sterling. It does not seek to interfere in any way with Sterling's use of the name Bayer on aspirin. Indeed to assure that the relief sought would not result in confusion between Sterling's Bayer aspirin and the large line of pharmaceuticals German Bayer would market under the Bayer name, the complaint specifically requested that in granting such relief the court should

> "prescribe appropriate means to assure that the products of [German] Bayer and Sterling are offered and sold under such circumstances as to distinguish the source as the product of the particular producer." (App. 20a)[7]

[7] As will be shown under Point III below this relief is in line with that applied in recent consent decrees entered in Government antitrust cases.

The decision below denied petitioner's claim for such relief necessary to secure a restoration of competitive conditions on the sole ground that Sterling had acquired without restriction Bayer trademarks which had been used to effectuate the illegal division of markets. The Court said:

> "Since we have determined that defendant acquired the trademarks without restriction as to use, defendant's mere exercise of its full rights therein cannot constitute such a misuse as to be the basis for an action under the anti-trust laws. 'It would be a paradox to say that the exercise of a right, expressly granted by law, is unlawful.' *Coca-Cola Co.* v. *J. G. Butler & Sons*, 229 F. 224, 232 (E.D.Ark., 1916)."

This holding is plainly in conflict with this Court's ruling in *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 592, 599 that

> "A trademark cannot be used illegally as a device for Sherman Act violations."

The Nature of the Issue

Petitioner, German Bayer, is one of the largest and best known manufacturers of pharmaceuticals, as well as many other chemical products. German Bayer's business and reputation extends throughout the free world. It is one of the oldest producers of chemicals, and its name has been associated with many of the signal discoveries in the field of pharmaceuticals. It has always conducted, and conducts in many parts of the world its business today, under various forms of the name Bayer.

German Bayer is one of those concerns, such as for example, Dupont or Ford who are of such world-wide renown that their good will cannot be compartmentalized into various individual countries. Any arrangement which prevents a company of this kind from competing under its name in the United States clearly represents a restraint on competition.

German Bayer is restrained from competing in the United States with its pharmaceuticals under the Bayer name. Any use of this name by Geman Bayer, in whatever form, is, as Sterling's past conduct has shown, likely to be attacked by Sterling as an infringement of its United States registrations to the Bayer trademarks. These trademarks, which Sterling uses in connection with its aspirin, restricts German Bayer from competing in the United States with a large line of pharmaceutical products.

German Bayer brought this action under the antitrust laws in order to remove this restraint on its competition in the United States. The relief sought by German Bayer was the removal of this barrier to competition by enjoining Sterling from employing the Bayer trademarks to keep out the large line of pharmaceutical products manufactured by German Bayer and sold by German Bayer in most parts of the world.

Petitioner's claim may be briefly summarized as follows: The relief requested is necessary and appropiate to remove a barrier to the import of petitioner's product into the United States which had been set up by illegal agreements entered into between German Bayer and Sterling in 1923. The source of Sterling's power to prevent the use by German Bayer

of a form of the Bayer name in the United States, are the 1923 division of markets agreements which both parties concede to be in violation of the antitrust laws. The continued use, therefore, by Sterling of this power to restrain German Bayer's competition in the United States after the termination of the illegal agreements constitutes a continuation of one of the restraints imposed by the illegal 1923 agreements. Accordingly, under the antitrust laws, petitioner is entitled to an injunction removing this restraint by enjoining respondent from interfering with use of a form of the Bayer name by German Bayer.

The decision of the Third Circuit denying petitioner this relief, perpetuates the restraint on German Bayer's competition in the United States. It remains as a permanent obstacle to the right of one of the most important foreign producers of pharmaceuticals to compete effectively on the American market.

I. The Decision of the Third Circuit is in Conflict With This Court's Decision in *Timken*

The Third Circuit's disposition of the case is plainly in conflict with this Court's holding in *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 592 (1941). In *Timken* this Court held that an international division of markets between American, French and English producers of roller bearings, effectuated by an allocation of the trademark "Timken" to the producers in each respective country constituted a violation of the antitrust laws.

The Third Circuit believed it could avoid the antitrust aspects of this case, and the plain impact of *Timken* by disposing of this case on the ground that Sterling's trademark rights were unrestricted. The

Third Circuit, did not reject the theory of petitioner's claim for relief under the antitrust laws. The result of the Third Circuit's decision is, however, as inconsistent with *Timken* as would have been a direct rejection of petitioner's claim for relief under the antitrust laws.

The Third Circuit sought to dispose of the case in the following manner:

It held that the source of Sterling's power to prevent German Bayer from using a form of the Bayer trademarks in the United States did not stem from the concededly illegal 1923 agreements because prior to the conclusion of these illegal agreements, Sterling had, through its purchase of the capital stock of New York Bayer in 1918, acquired unrestricted rights to the Bayer trademarks. The Court traced New York Bayer's rights to these trademarks to certain agreements which German Bayer may have concluded with New York Bayer in 1913.

(The Court construed these agreements, we believe, erroneously, as meaning that German Bayer in consenting to the transfer of the Bayer trademarks from Farbenfabriken of Elberfeld Co., up until then its U.S. distributing subsidiary, to New York Bayer, its new distributing subsidiary, also conveyed to New York Bayer such absolute rights to these trademarks as to include the power to exclude any competition by German Bayer under these marks. Although for present purposes, we must assume that the construction given to the agreement by the Third Circuit is correct, we cannot omit to state that such a construction is, in our view, inconsistent with the plain meaning of the agreements and with the parent-sub-

sidiary relationship existing at that time between German Bayer and New York Bayer).[8]

A. On this petition we raise only the question whether the Third Circuit's determination that, since under such a construction of the 1913 agreements, Sterling acquired the trademarks without restriction as to use, its exercise of its rights to the trademarks "cannot constitute such a misuse as to be the basis for an action under the antitrust laws" and that, therefore, these agreements are "dispositive" of this case.

We assert that German Bayer is entitled to relief irrespective of whether the 1913 agreements constituted a transfer of the Bayer trademarks to New York Bayer without restriction.

For ownership of trademarks without restriction does not, as the Third Circuit apparently believed,

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[8] We think it is clear from the context of the 1913 agreement, quoted and relied upon by the court below, 307 F. 2d at 213, that the trademarks transferred together with the right to sell in the United States products "manufactured and/or controlled" by German Bayer were restricted in their use to the same purpose, and in no event for the purpose of preventing the sale of German Bayer's products in the United States under these trademarks.

The parent-subsidiary relationship existing between German Bayer and New York Bayer at the time these agreements were made makes such a construction imperative and the opposite conclusion inconceivable.

Furthermore, Farbenfabriken of Elberfeld Co., German Bayer's distributing agent up until 1913, and whose rights New York Bayer acquired, under the 1913 agreement, did not have the right to assign the Bayer trademarks to New York without the permission of German Bayer. This plainly shows that New York Bayer could not by this transfer have acquired unrestricted rights to these trademarks.

In any case where an agreement may be reasonably construed in such a way as not to result in violation of the antitrust laws, it should not be given a construction which, as we shall see below, would make it violative of these laws.

include the right to use the trademarks in order to violate the antitrust laws. *Timken Roller Bearing Co.* v. *United States, supra*, 341 U.S. at 599.

Sterling clearly has used these trademarks to violate the antitrust laws. Prior to the 1923 agreements Sterling's right in the Bayer trademarks in no event included the right to protect itself against competition by Bayer. Prior to these agreements German Bayer could not only have competed in the American market, but notwithstanding the trademarks owned by Sterling, it could have competed under some form of the Bayer name. This is clear from *Koppel Industrial Car & Equipment Co.* v. *Orenstein & Koppel Aktiengesellschaft et al.*, 25 F. 2d 716 (2nd Cir. 1928), where the Second Circuit held that a German corporation could compete under its own name with its former subsidiary which had been vested and sold by the Alien Property Custodian. Sterling acquired the right to restrain such competition only through the illegal uses made of these trademarks under the 1923 agreements. Sterling employed the leverage of the trademark rights it secured with the purchase of New York Bayer to obtain in the 1923 agreements the complete exclusion of petitioner from the American market and a division of world markets between German Bayer and Sterling based on an express allocation of trademarks involving the United States as well as many other countries.

Sterling's power to restrict competition by German Bayer is because of these illegal agreements, substantially greater today than it would have been had the illegal agreement not been concluded but German Bayer had exercised its right to compete on the American market. The mere termination of the illegal

agreements by the consent decrees did not sweep away the trademark position Sterling had illegally built up as the result of exclusion of petitioner from the American market under these agreements.

The assertion by Sterling of the trademark rights so acquired constitutes, we submit, a continuation of one of the restraints of the illegal agreements. Unless removed it maintains in effect a division of territory forbidden under *Timken*.

Accordingly, the Third Circuit's conclusion that Sterling acquired unrestricted rights to the trademarks by reason of the 1913 contracts is plainly not dispositive of this case. Unrestricted rights to a trademark do not and cannot include the right to misuse these trademarks in violation of the anti-trust laws as Sterling has done and continues to do.

B. Moreover the decision of the Third Circuit erroneously pre-supposes that while the division of markets and the exclusion of petitioner from the American markets, as effectuated by the 1923 agreements, is in violation of the antitrust laws, that a similar division of markets and the exclusion of petitioner from the United States resulting from the 1913 agreements as construed by the Court, is not a violation of the anti-trust laws.

Pursuant to the 1913 agreements, as construed by the Court, German Bayer agreed not to compete on the American market and gave New York Bayer, as means to insure its freedom from competition by its parent, all rights to the Bayer trademarks in the United States, including the right to prevent the importation of goods by its parent. In return, German Bayer was to receive 50% of the profits. This arrangement is strikingly

similar to the 1923 agreements which contain provisions to the same effect and which is *concededly* in violation of the antitrust laws. The 1913 agreements, as construed by the Third Circuit, represents an allocation of markets effectuated by a trademark allocation preventing German Bayer from competing in the United States. Such an arrangement, illegal in its inception, comes plainly to the surface with the purchase of New York Bayer by Sterling. The effect of the 1913 agreements, accompanied by the later sale of the capital stock of New York Bayer to Sterling, is exactly the same is if Sterling and German Bayer had entered directly into an international division of markets agreement, as they did in 1923.

Under this Court's decision in *Timken*, any such division of territories affecting the commerce of the United States violates the antitrust laws, and in our view, constitutes a *per se* violation of these laws.[9] Judge Weinfeld in his opinion in *United States* v. *Bayer Company*, 135 F. Supp. 65, 70 (S.D.N.Y. 1955) stated with respect to the very same 1923 agreement between German Bayer and Sterling which are involved in this case

> "The allocation of world markets of the defined pharmaceutical products amongst Bayer, I. G. Farben and Bayer Products Limited, is so per-

[9] A recent work by one of the leading authors in this field, Fugate, *Foreign Commerce and the Antitrust Laws*, (1958) p. 109, in discussing *Timken*, comments:

> "The Supreme Court, while it has not expressly used the term 'unreasonable *per se*' in regard to this typical cartel arrangement, has, in effect, considered that it falls within that category."

vasive as to constitute a *per se* violation of § 1 of the Sherman Act. . . ."[19]

As previously noted, the 1913 agreements, as construed by the Third Circuit, resulted in a division of markets between Sterling and German Bayer through trademark allocation and had an effect on competition similar to the 1923 agreements. Indeed, if the 1913 agreements are construed as the Third Circuit has done, then the 1923 agreements represent merely a reconfirmation of the situation created as a result of the 1913 agreements.

Accordingly, in no event can the 1913 agreements be considered depositive of petitioner's claim. Whether the restraint originated from the 1913 agreements, accompanied by the sale of New York Bayer to Sterling or by the 1923 agreements alone makes, in our view, no difference in terms of the relief to which petitioner is entitled under the antitrust laws. It cannot, in our view, effect petitioner's right to have this restraint removed and its right to compete under the Bayer name secured. In either case the restraint arises from an arrangement violative of the antitrust laws under this Court's decision in *Timken* and if not removed con-

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[19] See also, Judge Ryan's comment in *United States* v. *Imperial Chemical Industries*, 100 F. Supp. 504, 592 (S.D.N.Y. 1951):

"... the law is crystal clear: a conspiracy to divide territories, which affects American commerce, violates the Sherman Act."

For a statement to the same effect, see *United States* v. *National Lead Co.*, 63 F. Supp. 513, 523 (S.D.N.Y. 1945, *aff'd*, 332 U.S. 513):

"No citation of the authority is any longer necessary to support the proposition that a combination of competitors, which by agreement divides the world into exclusive trade areas, and suppresses all competition among the members of the combination, offends the Sherman Act."

tinues in effect a barrier to competition which is irreconcilable with *Timken*.

The Importance of the Issue

C. There remains, as seen above, in this case, the important issue as to German Bayer's right under the antitrust laws to freely compete in the United States under a form of the Bayer name.

This issue is important for two reasons: The right of a foreign company to a restoration of competitive conditions after an international division of territories arrangement of which it was a participant has been ordered terminated by a government action is a question very likely to arise as a result of future enforcement of the antitrust laws against the American participants to such an arrangement. On the answer to this question depends to a considerable extent whether the enforcement of the antitrust laws against such American companies will actually result in open and free competition in the American market between the former participants in such restrictive arrangements.

The issue is also a significant one because this case involves a restraint which hinders a potentially important competitor from competing effectively on the American market.

II. The Decision of the Third Circuit is in Conflict With the Decision of the Second Circuit in the *Orenstein-Koppel* Case

There is, in our view, a conflict between the Third Circuit's disposition of this case and the Second Circuit's holding in *Koppel Industrial Car & Equipment Co.* v. *Orenstein & Koppel Aktiengesellschaft et al.*, 25 F. 2d 716. That case involved an unfair competition

suit by an American corporation against its former German parent seeking an injunction against the former parent from competing under its name in the United States. The Second Circuit, in modifying a decree granting such an injunction, permitted the German parent to describe the goods sold by it as "manufactured in Germany by the German house of Orenstein-Arthur Koppel." This case, while an unfair competition case and not an antitrust case, appears to have been decided on the basis of antitrust considerations. Relief was granted there, even though the use of such a name might otherwise constitute unfair competition because, as the Court stated, 25 F. 2d at 717:

> ". . . it seems to us that the protection of the defendants in the right to compete at all, which we recognize, requires that they shall be allowed to describe their goods by the true name of their maker."[11]

The policy implied in *Orenstein-Koppel* is the same as that expressed in *Timken*. In *Orenstein-Koppel* the court refused to give the sale of the German company's American subsidiary, which like New York Bayer had been vested by the Alien Property Custodian, the effect of excluding the German parent from competing in the United States under its own name. Without expressly relying on the antitrust laws (which at that time had not yet been much applied to international restraints of competition) the court, we think, acted as it did so as not to create an effective division of

[11] For a decision involving a similar situation and reaching the same result see *American Bosch Magneto Corporation* v. *Robert Bosch Magneto Company*, 215 N.Y. Supp. 389 (Sup. Ct. 1926).

markets between the German parent and its former American subsidiary. *Orenstein-Koppel*, in limiting the rights of the former subsidiary expresses a strong public policy against the restriction of competition by giving the owner of a name and trademark in the United States the power to exclude competition by a foreign competitor which is the orginator of such name and mark. This policy was completely ignored by the Third Circuit. The resulting conflict between the Circuits requires resolution by this Court.

III. The Decision Below Denying Relief to Petitioner Is Contrary to the Antitrust Policy Expressed in *Timken* and *Orenstein-Koppel* and as Implemented by the Government

The relief which petitioner is seeking in this action —the right to use a form of the Bayer name in the sale of pharmaceuticals in the United States free from interference by Sterling—is, in light of *Timken* and *Orenstein-Koppel*, clearly a necessary and appropriate remedy. It is the only way the restraint of competition arising from an illegal division of territories can be removed, and German Bayer placed in a really competitive position on the American market. Any other resolution of this case leaves in effect a practical division of markets between German Bayer and Sterling.

Petitioner's claim for relief is a necessary form of implementing the principles expressed in *Timken* and implicit in *Orenstein-Koppel*. Though, without direct judicial precedent, petitioner's claim is, we think, compelling in its simple logic. It is also squarely in line with the policy of the Department of Justice as expressed in the provisions of a number of consent

decrees in cases involving comparable international divisions of markets.

Most pertinent in this respect is the amended consent decree entered in *United States* v. *The American Bosch Corp.*, Civil Action No. 20-164 (S.D.N.Y. 1942). That case, as to this one, involved a division of markets agreement between German and American companies. As a result of World War I vesting, each had the right to use the Bosch name in various parts of the world. The original consent decree was entered in 1942. In 1948, however, in order to eliminate the restraint of competition arising out of this agreement, the decree was amended to include a specific provision enjoining the American Bosch Corporation from interfering with the right of the German company, Robert Bosch G.m.b.H., to compete in the United States under the Bosch name. The decree in that case enjoined the American Bosch from:

> "Interfering with or preventing, by suit for trademark infringement or other action based on trademark or tradename rights, Robert Bosch . . . or any other corporation, association, firm or person whomsoever which manufactures, sells or distributes Bosch products, from shipping such products into or disposing of them in, the United States under any name or designation rightfully attached to such products in the territory from which exported, provided such parties take appropriate steps to prevent confusion of such products with those produced by American Bosch."

See also the consent decree in *United States* v. *SKF Industries, Inc.*, CCH 1950-1951 Trade Cases § 62,708.

Paragraph V(6), and Fugate, *Foreign Commerce and the Antitrust Laws* p. 318.[12]

The policy of the Department of Justice as expressed in these decrees, is that barriers to trade arising out of trademark allocations undertaken to implement illegal international divisions of market must be removed to restore competitive conditions. This policy of the Department is consistent with and motivated by the same considerations as were the decisions in *Timken* and *Orenstein-Koppel*.

IV. The Decision of the Court Below is a Denial of Due Process in Violation of the Decision of This Court in *Fountain* v. *Filson*, 336 U.S. 681, and Contrary to the Decision of the Sixth Circuit in *Begnaud* v. *White*, 170 F. 2d 323

The procedure followed by the Court of Appeals violated due process and is in conflict with this Court's decision in *Fountain* v. *Filson*, 336 U.S. 681 and contrary to the decision of the Sixth Circuit in *Begnaud* v. *White*, 170 F. 2d 323. This is because the Court of Appeals in affirming the decision of the District Court relied on supposed 1913 agreements whose execution

[12] Fugate, an expert in this field, states:

> "'Trade-mark relief is included in antitrust judgments where trade-marks have been used as an instrument of antitrust violation, or in consent judgments, where trade-marks are alleged to have been so used. This type of relief has been employed mainly in foreign trade cases. It is designed to remove barriers to the United States imports and exports, which have been set up by parties to illegal arrangements, where the parties have restricted United States commerce through the use of trade-marks. *The court, for example, may order* the adoption by an American defendant of a new mark or marks for foreign trade, or *may order that a mark registered in the United States not be enforced to keep out imported products bearing a similar mark*." (Emphasis supplied.)

and performance were never proved, and with respect to which petitioner never had any opportunity to defend itself.

These agreements were not the basis for the District Court's grant of summary judgment. Nor were they even presented to the District Court in support of respondent's request for such judgment. The agreements were presented by respondent only in opposition to petitioner's cross-motion.

This Court held in *Fountain* v. *Filson*, 336 U.S. 681 that a Court of Appeals may not order the grant of a summary judgment where it was based on "a new issue as to which the opposite party had no opportunity to present a defense before the trial court." *Id.* at 683.

Under that decision it was clearly improper for the Court of Appeals to base its decision granting summary judgment on the 1913 agreements. This is because petitioner had never conceded the execution of these agreements but had assumed the execution and performance of the agreements solely for purposes of its own motion for summary judgment.

Respondent did not rely on the 1913 agreements in support of its motion for summary judgment. This motion had been based on the sole ground of laches. Thus, petitioner did not have any occasion to submit evidence relevant to these agreements as a defense to respondent's motion. Respondent's motion for summary judgment was briefed, argued and placed *sub judice* without any reference ever having been made to the 1913 agreements. Respondent's motion was filed April 22, 1960 (App. 148a), and argued July 20, 1960. The supposed 1913 agreements were presented to the court only seven months later on February 9, 1961 (App. 156a) under the following circumstances:

While respondent's motion was *sub judice* petitioner filed a cross-motion for summary judgment on the merits.[13] As a *defense* to petitioner's motion, respondent, together with its reply memorandum in opposition, filed six days before oral argument, submitted by affidavit the minutes of a meeting of the Board of Directors of New York Bayer at which the execution of the supposed 1913 agreements was authorized (App. 157a). Sterling did not prove that the agreements were in fact executed and presented no evidence showing that these agreements had been performed in whole or in part.

Petitioner in its reply memorandum in support of its own motion filed on February 14, 1961, the day prior to oral argument, assumed that for purposes of its own motion for summary judgment these agreements were in fact executed and performed. It urged that even, assuming execution and performance these agreements, they presented no obstacle to petitioner's motion, but rather supported it. Thus, petitioner in its Reply Memorandum stated, p. 12:

> "While defendant is unable to find in its files executed copies of these agreements and is not certain whether these agreements were executed, and while plaintiff does not have copies of these agreements in its file, plaintiff assumes *for the purposes of this motion* that these agreements were executed and carried out by the parties." (emphasis supplied)

Since this concession was only for purposes of petitioner's motion for summary judgment, it could not be used for any other purposes and especially it could not support summary judgment for respondent. As the Sixth Circuit held in *Begnaud* v. *White*, 170 F. 2d at 327:

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[13] Petitioner's cross-motion was filed on January 17, 1961 (App. 148a) and argued February 15, 1961.

> "The fact that both parties make motions for summary judgment, and each contends in support of his respective motion that no genuine issue of fact exists, does not require the court to rule that no fact issue exists. Each, in support of his own motion, may be willing to concede certain contentions of his opponent, which concession, however, is only for the purpose of the pending motion. If the motion is over-ruled, the concession is no longer effective. Appellants' concession that no genuine issue of fact existed was made in support of its own motion for summary judgment. We do not think that the concession continues over into the court's separate consideration of appellee's motion for summary judgment in his behalf after appellants' motion was over-ruled."

Thus, with the denial of petitioner's motion this concession became ineffective. The affidavit submitted by respondent alone, was clearly insufficient to establish the execution and performance of the 1913 agreements in such a way as to exclude any real doubt as to the existence of genuine issue of fact with respect to these agreements. Absent such a showing, there is no basis for summary judgment. 6 *Moore's Federal Practice* 2123-2125. See *e.g., Doehler Metal Furniture Co.* v. *United States,* 149 F. 2d 130, 135 (2d Cir. 1945).

Accordingly, the case was decided against petitioner on an issue—i.e., the 1913 agreements—which were not presented in support of Sterling's motion for judgment and which petitioner had no opportunity to contradict. If, in fact, the execution and performance of the 1913 agreements should be deemed dispositive then petitioner was entitled to an opportunity to address itself to this question. In fact, petitioner has evidence tending very strongly to show that the practice of the parties to the supposed 1913 agreements was, in fact, at

variance with the construction given to it by the Court of Appeals—a fact which would show conclusively either that the agreements were not executed or were construed by the parties in a manner contrary to what the Court of Appeals regarded as their "plain meaning."

Therefore, not only theoretically but in fact petitioner was deprived of an opportunity to make a defense to the issue which the Court of Appeals decided as dispositive. Of this, petitioner had no notice since, concededly, the Court of Appeals decision was "on grounds . . . different than those of the District Court" 307 F. 2d at 212, n. 4.

The denial of this elementary right of defense on the merits is not only a violation of the decision of this Court in *Fountain* v. *Filson*, and of the Sixth Circuit in *Begnaud* v. *White*, but in the words of Rule 19(b) of this Court's Rules has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."

CONCLUSION

For the reasons stated the writ should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,807

FARBENFABRIKEN BAYER A. G., *Appellant*,
v.
STERLING DRUG, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued May 7, 1962

Before McLAUGHLIN, STALEY and GANEY, *Circuit Judges*.

Opinion of the Court

(Filed August 9, 1962)

By STALEY, *Circuit Judge*.

This is a civil action commenced under the antitrust laws, § 1 of the Sherman Antitrust Act, 15 U.S.C.A. § 1, and §§ 4 and 6 of the Clayton Act, 15 U.S.C.A. §§ 15 and 26. In its complaint, plaintiff alleged that defendant has without right asserted trademark rights in the word "Bayer" and the Bayer Cross, as a means of suppressing competition, and that such assertion constitutes a violation of the antitrust laws. Plaintiff requested injunctive relief and treble damages. The essence of the prayer for injunctive relief was that defendant be directed to give all necessary consents and licenses, without cost, to permit plaintiff to import into or manufacture in the United States, products under the name Bayer and the use of the Bayer Cross trademark, and that the district court prescribe a procedure permitting the products of both plaintiff and defendant to be offered and sold under that name and trademark but in such a manner as to distinguish the source of the product.

In 1953, plaintiff, Farbenfabriken Bayer, A.G., a corporation organized under the laws of the Federal Republic of Germany, took over a part of the business formerly conducted by I. G. Farbenindustrie, A.G. ("Farben"). In 1925, Farben succeeded Farbenfabriken vorm. Friedrich Bayer & Company ("Farbenfabriken"). Farbenfabriken formed two New York corporations in 1913, Synthetic Patents Company, Inc., and The Bayer Company, Inc. ("Bayer").

Defendant, Sterling Drugs, Inc., a Delaware corporation, is, like plaintiff, engaged in the development, manufacture and sale of drugs and pharmaceuticals. After the United States entered the First World War, the Alien Property Custodian seized Farbenfabriken's assets in the United States, including the stock of Bayer, and in 1918 sold them to defendant. Thereafter, Bayer's ethical drug business was transferred to its newly organized subsidiary, Winthrop Chemical Company, Inc., and in 1923, the capital stock of Winthrop was transferred to defendant.

In 1923, Farbenfabriken and Bayer entered into a cartel agreement involving a world division of markets. It was admitted in the district court that the agreement was violative of the antitrust laws.[1]

Concluding that the statute of limitations had expired, the district court dismissed plaintiff's claim for damages, 153 F. Supp. 589 (D.N.J., 1957),[2] and denied the request for injunctive relief on the basis "that the equitable remedy

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[1] The agreement was adjudged violative of the antitrust laws by the United States District Court for the Southern District of New York on September 5, 1941, in United States v. The Bayer Co., Civil Action No. 15-364.

[2] The district court originally relied on the New Jersey six year statute of limitations contained in NJSA 2A:14-1. Thereafter, the district court, following our decision in Gordon v. Loew's, Inc., 247 F. 2d 451 (1957), modified its order and applied the two year limitation contained in NJSA 2A:14-10.

available under Section 16 is predicated upon the legal cause of action created by Section 4," and that inasmuch as the legal claim for damages was barred, the equitable remedy would be denied.

Although the parties have raised numerous questions on this appeal, we shall limit our discussion to the dispositive one.

The defendant contends that by purchasing the stock of Bayer from the Alien Property Custodian in 1918, it acquired the trademarks in question as they were assets of Bayer. Plaintiff says that defendant's continued use of the trademarks is based exclusively on the illegal 1923 agreements.[3] Plaintiff admits that the purchase of Bayer stock by defendant gave it all the rights Bayer had in the trademarks, but says that the right to use the trademarks was restricted to pharmaceuticals "manufactured and (or) controlled" by Farbenfabriken. In any event, it says that it has a right to concurrent use of the trademarks and cites American Bosch Magneto Corp. v. Robert Bosch Magneto Co., 215 N.Y.Supp. 387 (Sup. Ct. 1926).

We think that defendant acquired absolute rights to the exclusive use of the trademarks in question by its purchase of Bayer.[4]

The power vested in the Alien Property Custodian was clearly spelled out in the Trading with the Enemy Act ("Act"), originally passed on October 6, 1917, 40 Stat. 411,

[3] In addition to the 1923 agreement with Bayer, plaintiff in that year executed an agreement with Winthrop wherein plaintiff agreed not to contest title to the trademarks Bayer and the Bayer Cross.

[4] Of course, this court can affirm based on the record before it, even though the grounds be different than those of the district court. Continental Ore Co. v. Union Carbide & Carbon Corp. 289 F. 2d 86 (C.A. 9, 1961); Ginsburg v. Black, 237 F. 2d 790 (C.A. 7, 1956), cert. denied, 353 U.S. 911 (1957).

and amended on March 28, 1918, 40 Stat. 460, 50 App. U.S.C.A. § 12. It provided in pertinent part:

> "The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof, or make any disposition thereof, or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof * * *."

As the statute unmistakably shows, it was the intention of Congress to enable the Alien Property Custodian to sell property as fully as the owner could, and a sale by the Custodian is as complete as if it were a voluntary conveyance by the foreign corporation (Farbenfabriken) whose assets were seized. Koppel Industrial Car & Equipment Co. v. Orenstein & Koppel Artiengesellschaft, 289 Fed. 446 (C.A. 2, 1923). That Congress intended to give finality to sales by the Custodian is best shown by a 1918 amendment to the Act, which provided that

> "The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Prop-

erty Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States." 40 Stat. 1020, 50 App. U.S.C.A. § 7.

It becomes imperative, therefore, to determine what rights Bayer had in the trademarks Bayer and Bayer Cross, for admittedly the Alien Property Custodian transferred all of Bayer's rights to defendant. In 1908, Farbenfabriken of Elberfeld Company, a New York corporation wholly owned by Farbenfabriken, registered the trademarks in the United States. The trademarks were registered on the basis that Farbenfabriken of Elberfeld had used them since 1895. In 1913, Farbenfabriken dissolved Farbenfabriken of Elberfeld. In the same year, Bayer was incorporated under New York law, whereupon certain assets, including the trademarks in question, were transferred to it. At its first Board of Directors meeting, Bayer authorized and directed its officers to enter into certain contracts with Farbenfabriken. One of them, dated June 12, 1913, provided:

> "Bayer Co. agrees, and binds itself hereby, to pay unto Leverkusen [Farbenfabriken], the sum of Seven Hundred and Fifty Thousand Dollars ($750,000) in lawful money of the United States on or before the 12th day of June, 1916. And Leverkusen hereby consents to and ratifies the sale, transfer and assignment to Bayer Co. by the New York corporation Farbenfabriken of Elberfeld Co. of the right for the sale in the United States and Canada of the drugs, chemicals, pharmaceuticals and any and all other products and articles manufactured and (or) controlled by Leverkusen; and Leverkusen also hereby consents to and ratifies the sale, transfer and assignment by said Farbenfabriken of Elberfeld Co. to Bayer Co. of its (said Farbenfabriken of Elberfeld Co.'s) trade-marks, good will and other assets and property."

Use of those trademarks by Bayer and its successor, defendant, has been exclusive since 1917. The agreement, execution of which has never been denied, was fully performed by Bayer. It was absolute and neither imposed any limitation on use of the trademarks nor retained any interest therein in favor of Farbenfabriken. The agreement presents no problem of construction, and all that is left to us is to give force to the plain words.

Furthermore, in its complaint, plaintiff alleged that defendant, as a result of the sale by the Alien Property Custodian "obtained control in the United States of the trademark Bayer, and the Bayer Cross and the name Aspirin (then a valid trademark in the United States), as well as a host of other valuable trade names," and in paragraph 18, as follows:

> "Thus Sterling found itself in possession of the invaluable Bayer trademarks in the United States, probably the most important single market in the world. At that time, Bayer which was the original and true owner of the name, was in a weak and defenseless position."

Plaintiff says, however, that the conveyance of trademark rights to Bayer was not absolute but was restricted to use of the trademarks to pharmaceuticals "manufactured and (or) controlled" by Farbenfabriken. It points to a distributorship contract executed between Bayer and Farbenfabriken in 1913. But the agreement of purchase of trademarks was not so limited. For us to so conclude would require a rewriting of the trademark agreement. This we are not free to do. Each agreement was a separate one, individually executed, and in no way making reference to the other. The distributorship contract was limited in time, while the other was absolute and contained no time limitation.

Having shown that defendant had full and complete ownership of the trademarks in question, the plaintiff neces-

sarily does not have a right to concurrent use of them. In this regard, it refers us to American Bosch Magneto Corp. v. Robert Bosch Magneto Co., 215 N.Y.Supp. 387 (Sup. Ct. 1926). There, the Company whose assets the Alien Property Custodian seized and sold had only limited rights in the trademark.

Since we have determined that defendant acquired the trademarks without restriction as to use, defendant's mere exercise of its full rights therein cannot constitute such a misuse as to be the basis for an action under the antitrust laws. "It would be a paradox to say that the exercise of a right, expressly granted by law, is unlawful." Coca-Cola Co. v. J. G. Butler & Sons, 229 Fed. 224, 232 (E.D.Ark. 1916).

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

FARBENFABRIKEN BAYER, A. G., a corporation, *Plaintiff*,

v.

STERLING DRUG INC., a corporation, *Defendant*.

Civ. A. No. 908-55.

United States District Court
D. New Jersey.

July 27, 1961.

WILLIAM F. SMITH, Chief Judge.

This is a civil action under the anti-trust laws, and particularly Section 1 of the Sherman Act, as amended, 69 Stat. 282, 15 U.S.C.A. § 1, and Sections 4 and 16, of the Clayton Act, 38 Stat. 731 and 737, 15 U.S.C.A. §§ 15 and 26. The action is brought by the plaintiff, a corporation organized under the laws of Germany, as the "legal successor in interest" to certain rights of Farbenfabriken vorm. Friedrich Bayer and Company, et als. The essential allegations of the complaint are summarized in the earlier opinion of this Court. Farbenfabriken Bayer, A. G. v. Sterling Drug, 153 F. Supp. 589. There is no reason to repeat the summary in this opinion.

The history of the relationship between the parties and their predecessors is recited in the opinion filed in the companion case. Farbenfabriken Bayer, A. G. v. Sterling Drug Inc., 197 F. Supp. 613. The recital is based upon the Stipulation of Facts and the undisputed allegations of the complaint. It appears therefrom that the predecessors of the plaintiff and the defendant and its predecessors had been engaged in an unlawful combination and conspiracy in restraint of trade and commerce in pharmaceutical products prior to September 5, 1941. It also appears that the

illegal contracts of 1920, 1923 and 1926 were in furtherance of the said conspiracy.

The action is before the Court at this time on a motion for summary judgment and a counter-motion for summary judgment, filed by the defendant and plaintiff, respectively, under Rules 56(b) and 56(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A. The motions are based upon the record thus far made, which includes the pleadings, stipulation, exhibits, and affidavits.

Earlier Proceeding

The action was heretofore before the Court on a motion for judgment on the pleadings filed by the defendant under Rule 12(c) of the Federal Rules of Civil Procedure, 28 U.S.C.A. We then treated the motion as one to dismiss the complaint. The defendant argued in support of the motion that the action was barred by Section 2A:14-1 of the New Jersey Revised Statutes, N.J.S.A. 2A:14-1, which prescribes a six year period of limitation.

The plaintiff and the defendant at that time agreed that in the absence of a federal statute of limitation the local statute of limitation was applicable. It should be noted that the present action was commenced on September 28, 1955, before the effective date of Section 4B of the Clayton Act, 15 U.S.C.A. § 15b. The parties were also in agreement as to the applicability of Section 2A:14-1 of the New Jersey Revised Statutes, supra.

The opinion of the Court was filed on July 15, 1957. The question as to when the statute of limitation commenced to run was therein decided and we held that the "statute of limitations runs from the commission of the last overt act alleged to have caused damage" and not from the time of the consequent injury. Farbenfabriken Bayer, A. G. v. Sterling Drug, supra, 153 F. Supp. 592-597, inclusive. We adhere to this view for the reasons stated in the opinion.

We held further that the provisions of Section 2A:14-1, supra, were applicable and that thereunder the claim for treble damages was barred by the six year period of limitation therein prescribed. It has since been decided by the United States Court of Appeals for this Circuit that the provisions of the said section are not applicable. Gordon v. Loew's Incorporated, 247 F. 2d 451.

The precise question as to which of two local statutes was applicable was carefully considered in the case of Gordon v. Loew's, Incorporated, supra. It was therein decided that Section 2A:14-1 was not applicable to an action for treble damages under Section 4 of the Clayton Act, supra. It was held that such an action is essentially one for a penalty within the meaning of Section 2A:14-10 of the New Jersey Revised Statutes, N.J.S.A. 2A:14-10, and is barred by the two year period of limitation therein prescribed. The rule of the cited case has been followed in two later cases, to wit, Carlton Lamp Corporation v. General Electric Company, 3 Cir., 254 F. 2d 815; Dean Oil Company v. American Oil Company, 254 F. 2d 816, 3 Cir., certiorari denied 358 U.S. 835, 79 S. Ct. 58, 3 L. Ed. 2d 72.

We are of the opinion that the claim for treble damages was properly dismissed on the earlier motion of the defendant; however, the opinion of the Court is modified to reflect the applicability of Section 2A:14-10, supra. The earlier dismissal of the claim for damages was "without prejudice to the right of the plaintiff to apply to the Court for leave to file an amended complaint." Since the plaintiff has failed to avail itself of this right, the dismissal of the action is herein made final.

PRESENT PROCEEDING

The defendant's present motion for summary judgment is directed to the claim for injunctive relief under Section 16 of the Clayton Act, supra. It is argued that this claim is barred by the lapse of time under the doctrine of laches.

We are of the opinion that this motion must be sustained for the reasons hereinafter discussed.

[1] Section 4 of the Clayton Act, supra, grants to "any person * * * injured in his business or property by reason of anything forbidden in the antitrust laws" a right to maintain an action for treble damages. Section 16 of the Act, supra, grants an additional right to maintain an action for injunctive relief "against threatened loss or damage." We are of the opinion that the equitable remedy available under Section 16 is predicated upon the legal cause of action created by Section 4. It is essentially an equitable remedy in aid of a legal right created by the statute.

The statute of limitations, by its express terms, applies only to actions at law and may not be invoked as a defense against a claim exclusively equitable. However, where the equity jurisdiction is invoked in aid of a legal right, or is predicated upon a legal cause of action, equity "will withhold its remedy if the legal right is barred by the * * * statute of limitations." Russell v. Todd, 309 U.S. 280, 289, 60 S. Ct. 527, 532, 84 L. Ed. 754; see also Tobacco and Allied Stocks v. Transamerica Corp., D.C., 143 F. Supp. 323, 325, et seq., affirmed on other grounds 3 Cir., 244 F. 2d 902.

The relevant rule is stated by the Supreme Court in Russell v. Todd, supra, as follows: "Even though there is no state statute applicable to similar equitable demands, when the jurisdiction of the federal court is concurrent with that at law, or the suit is brought in aid of a legal right, equity will withhold its remedy if the legal right is barred by the local statute of limitations." See also Cope v. Anderson, 331 U.S. 461, 463 et seq., 67 S. Ct. 1340, 91 L. Ed. 1602. We are of the opinion that the rule is applicable here and should be invoked to bar the claim for injunctive relief.

The rule was applied in the case of United West Coast Theatres Corp. v. South Side Theatres, D.C., 86 F. Supp.

109, at page 111, wherein it was held: "The local statute of limitations applicable to actions for damages will also be adopted and applied, in exercise of the equity jurisdiction of [the] court, to the injunctive relief sought pursuant to § 16 of the Clayton Act, 15 U.S.C.A. § 26."

The plaintiff admits the existence of a conspiracy in restraint of trade in violation of the antitrust laws prior to September 5, 1941, but alleges that its predecessor became a party to the conspiracy under economic duress and the contemporary coercion of the defendant's predecessors. The allegation is denied by the defendant, but for the purposes of the present motion we shall accept it as true.

[2] An aggrieved party who joins in existing conspiracy under such circumstances is not *in pari delicto* and therefore may maintain an action for damages and for injunctive relief under Sections 4 and 16 of the Clayton Act. Ring v. Spina, 2 Cir., 148 F. 2d 647, 652 et seq. See also Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 377 et seq., 47 S. Ct. 400, 71 L. Ed. 684. The predecessor to the plaintiff brought no such action. It continued performance under the illegal contracts for a period of eighteen years and continued to enjoy the benefits of the unlawful enterprise.

[3] The present action is brought by the plaintiff as the "legal successor in interest" to the rights of Farbenfabriken vorm. Friedrich Bayer and Company, Leverkusen, and I. G. Farbenindustrie, I. G. Farben. We are of the opinion that if the present action for injunctive relief were one brought by either of the named predecessors of the plaintiff it would be barred by the lapse of time under the doctrine of laches. The position of the plaintiff is no better than that of its predecessors. We are of the opinion that the equities favor the defendant.

The motion for summary judgment is granted. The defendant shall submit to the Court, on notice to the plaintiff, an appropriate order.

Office Supreme Court, U.S.
FILED
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 653.

FARBENFABRIKEN BAYER A.G.,

Petitioner,

v.

STERLING DRUG INC.,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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January 10, 1963.

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Sterling Drug Inc., respondent herein, respectfully submits that the Petition for a Writ of Certiorari in this case should be denied for the reasons hereinafter set forth.

Opinions Below.

The unanimous opinion of the United States Court of Appeals for the Third Circuit, filed August 9, 1962, is reported at 307 F. 2d 210 and is annexed to the Petition as Appendix A.

The opinions of the United States District Court for the District of New Jersey, filed July 15, 1957 and August 1, 1961, are reported at 153 F. Supp. 589 and 197 F. Supp. 627, respectively, and appear at pages 31a-38a and 190a-194a, respectively, of the printed Appendix prepared by

petitioner for use by the Court of Appeals and filed in this Court pursuant to Rule 21(4). The 1957 District Court opinion is also annexed hereto as Appendix A. The 1961 District Court opinion is also annexed to the Petition as Appendix B.

Questions Presented.

1. Should this Court grant certiorari in a private antitrust action, where provision for any public interest in the subject matter of the action has already been made in a decree entered in an antitrust suit brought by the United States, and where that decree is subject to revision or modification on an appropriate showing?

2. Does the ownership, use and assertion of registered United States trademarks acquired through purchase of stock from the Alien Property Custodian give rise to a private antitrust action by the former owner?

3. Is the power of the Alien Property Custodian so limited that an American purchaser at public sale of the vested capital stock of an American subsidiary of an enemy parent does not acquire the same rights of ownership he would acquire by direct purchase from the enemy parent?

4. Are petitioner's claims barred by the statute of limitations and the doctrine of laches?

5. Is a royalty-free license to use respondent's registered United States trademarks a remedy available to petitioner under the antitrust laws?

6. Is due process denied because the Court of Appeals in its unanimous opinion refers to a factual concession made by petitioner, where petitioner did not clearly limit

the concession and where neither the reference nor the concession is necessary to the Court's holding?

Introduction.

Petitioner, Farbenfabriken Bayer A.G. (herein called "Farben"*), is a corporation organized under the law of the Federal Republic of Germany (App.** 39a). It is engaged in the development, manufacture and sale of drugs, pharmaceuticals and other products, and conducts business, directly and through subsidiaries, in West Germany and in many areas throughout the world *(ibid.)*.

Respondent, Sterling Drug Inc. (herein called "Sterling"***), is a corporation organized under the law of the State of Delaware (*ibid.*). It is also engaged in the development, manufacture and sale of drugs, pharmaceuticals and other products, and conducts business, directly and through subsidiaries, in the United States and in many areas throughout the world (*ibid.*).

The complaint in this action (App. 6a-21a), filed September 28, 1955, purports to state a cause of action under

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* "Farben" is also used herein to refer, individually and collectively, to both petitioner and its alleged predecessors, I. G. Farbenindustrie A.G. (herein also called "I. G. Farben") and Farbenfabriken vorm. Friedrich Bayer & Company, both German corporations. The alleged succession is disputed by respondent but was conceded for the purposes of respondent's motions for summary judgment.

** "App." is used herein to refer to the printed Appendices prepared by the parties for use by the Court of Appeals and filed in this Court pursuant to Rule 21(4). "Pet." and "Pet. App." are used herein to refer, respectively, to the Petition and to the opinions of the courts below which are annexed to the petition and to this brief as appendices.

*** "Sterling" is also used herein to refer, individually and collectively, to both respondent and its predecessor, The Bayer Company, Inc., a New York corporation.

the antitrust laws of the United States. It charges (App. 8a-9a, 16a-20a) that Sterling has excluded Farben from participation in the American market for drugs and pharmaceuticals. This alleged exclusion is said to have been accomplished solely through Sterling's ownership, use and assertion of two registered United States trademarks, "Bayer" and the "Bayer Cross" ("Bayer" spelled vertically and horizontally in cross fashion) (*ibid.*).* Farben asserts (1) that it cannot sell its products in the United States without using those same trademarks (App. 17a-19a), (2) that Sterling's ownership, use and assertion of those trademarks somehow constitute a violation of the United States antitrust laws (App. 7a), and (3) that the District Court should therefore enjoin Sterling from enforcing its trademarks against Farben (App. 20a-21a).

On April 9, 1957, Sterling moved, pursuant to Rule 56, Fed. R. Civ. P., for summary judgment in the District Court on the basis of the applicable statute of limitations. The theory of Sterling's motion was that a claim for relief against an alleged conspiracy in violation of the antitrust laws cannot prevail in the absence of an overt act, and that no such overt act had been alleged within the statutory period. It was, and is, Sterling's position that its ownership, use and assertion of registered United States trademarks do not constitute the necessary illegal overt act.

In its opinion, filed July 15, 1957 (App. 31a-38a; Pet. App. 1b-9b), the District Court upheld Sterling's theory and dismissed so much of Farben's complaint as sought the recovery of damages. However, because the relevant

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* The complaint alleged that, at the time of filing, this exclusion was in part accomplished through Sterling's ownership of United States patents which related to discoveries made by Farben (App. 18a-19a). However, it is conceded that all patents to which the complaint refers have since expired, and the allegations relating to these patents are no longer relied on.

statute of limitations is by its terms applicable only to actions at law*, the District Court refused to dismiss so much of the complaint as sought equitable relief (App. 37a-38a; Pet. App. 8b-9b). It noted that the claim to equitable relief rested "on rather tenuous grounds" (App. 37a; Pet. App. 8b), but gave Farben an opportunity to allege a fresh overt act.

Over the course of the next three years, Farben filed three pre-trial statements, and, as a result of pre-trial proceedings conducted by the District Court, joined with Sterling in a lengthy and detailed stipulation of fact (App. 39a-135a).

It having become apparent from these measures that Farben simply could not allege a fresh overt act, Sterling again moved pursuant to Rule 56 for summary judgment in its favor on April 22, 1960 (App. 148a). The theory of this motion was that the latest conceivable overt act alleged by Farben had been committed in 1923, and that Farben's claim to equitable relief was therefore barred by the doctrine of laches.

A motion for summary judgment pursuant to Rule 56 was also filed by Farben, on January 17, 1961 (App. 148a-49a). The theory of Farben's motion, and of its opposition to Sterling's motion, was that Sterling's assertion of its trademark rights necessarily involved an assertion of rights

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* Through that time, both parties and the District Court believed the applicable statute of limitations to be the New Jersey six-year statute (N. J. S. A. 2A:14-1). Subsequently, decisions of the Supreme Court of New Jersey and the Court of Appeals have made it clear that the applicable statute is the New Jersey two-year statute (N. J. S. A. 2A:14-10), *Addiss* v. *Logan Corp.*, 23 N. J. 142, 128 A. 2d 462, 465-66 (1957); *Gordon* v. *Loew's Inc.*, 247 F. 2d 451, (3d Cir. 1957); *Carlton Lamp Corp.* v. *General Electric Co.*, 254 F. 2d 815 (3d Cir. 1958); *Dean Oil Co.* v. *American Oil Co.*, 254 F. 2d 816 (3d Cir. 1958), *cert. denied*, 358 U. S. 835. The District Court later modified its opinion to reflect this fact (App. 192a). It is undisputed that the modification had no effect upon the substance of the District Court's decision.

acquired by Sterling through certain agreements executed in 1923 which are concededly in violation of the antitrust laws. Sterling denies this theory and contends that it relies entirely upon the rights it acquired by purchase of stock from the United States Alien Property Custodian in 1918.

In an opinion filed August 1, 1961 (App. 190a-94a), the District Court granted Sterling's motion and entered final judgment in its favor (App. 194a-95a). The basis of its decision was, as Sterling had contended, that Farben's equitable claims were barred by the doctrine of laches. Farben's motion was dismissed without opinion (App. 195a).

An appeal was taken by Farben to the United States Court of Appeals for the Third Circuit, which, on August 9, 1962, filed a unanimous opinion affirming the judgment of the District Court (Pet. App. 1a-7a). The Court of Appeals did not discuss either the statute of limitations or the doctrine of laches. Instead the Court simply held that the Alien Property Custodian had in 1918 conveyed to Sterling the right to exclusive use of the trademarks, and that the assertion of lawfully acquired trademarks did not constitute a violation of the antitrust laws.

A Petition for Rehearing or, in the Alternative, for Clarification was denied by the Court of Appeals without opinion on September 11, 1962.

Counter-Statement of the Case.

The brief opposing the petition in the companion case (No. 652) contains much of the history of the relationship between the parties which is necessary to an understanding of the issues presented in this case. Rather than extend this brief by stating again what is said there, Sterling respectfully refers the Court to its Counter-Statement of

the Case in No. 652. The Counter-Statement in this brief is confined to such additional material as pertains only to this case.

"Bayer" and the "Bayer Cross" were registered as trademarks in the United States in 1908 by Farbenfabriken of Elberfeld Company, a New York corporation wholly owned by Farben (App. 40a). In 1913 Farben dissolved Farbenfabriken of Elberfeld Company and transferred certain of its assets, including those trademarks, to The Bayer Company, Inc., a newly-formed New York corporation also wholly owned by Farben (hereinafter called "Bayer") (*ibid.*).

Bayer had been incorporated on June 12, 1913. There is in the record (App. 156a-57a) an extract from the minutes of a meeting held that day by Bayer's Board of Directors. Those minutes reflect the Board's approval of three contracts, two of which were to be executed with Farben. In one of the latter (App. 157a), Farben required Bayer to pay to it, within three years, the sum of $750,000 as consideration for Farben's consent to, and ratification of, the sale and assignment to Bayer of the business, including trademarks and goodwill, of Farbenfabriken of Elberfeld Company. This agreement conveyed full and complete rights in the trademarks with no limitation concerning time or use.

In the other contract (App. 158a-59a), Farben made Bayer the exclusive manufacturer and distributor of its products in the United States. This franchise was exclusive but was limited to a term of eight years. Nowhere in that or in any other contract did Farben reserve the right to distribute those products itself in the American market, under "Bayer" or the "Bayer Cross", or any other trademark. In return, Bayer agreed to pay, commencing three

years from the date of the agreement (when payment of $750,000 under the first contract would have been completed), one-half of its net profits arising from that manufacture and sale.

Since 1918, when Sterling purchased all of the outstanding capital stock of Bayer from the United States Alien Property Custodian, Sterling* has been the exclusive user of "Bayer" and the "Bayer Cross" in the United States (App. 40a).

In 1923, Bayer, Sterling and Farben entered into a series of contracts (hereinafter called the "1923 Contracts") which provided for a division of world sales territories in pharmaceuticals and related products for a minimum term of 50 years (App. 41a, 49a-77a). Sterling agreed to sell these products (except aspirin in Latin America) only in the United States, Canada and Cuba (App. 54a, 62a, 64a), and agreed to refrain from competing with Farben in the other markets of the world (App. 54a, 64a).

The contract between Farben and Bayer recognized Bayer's ownership of the trademarks:

> "WHEREAS New York are the proprietors of various trademarks in the United States of America including the name 'Bayer' and the 'Bayer Cross' trademark as applied to various products * * *." (App. 58a).

That agreement also provided that on its expiration

> "* * * the business together with the goodwill trademarks and unexpired patents shall *remain* the sole property of New York * * *." (App. 66a).**

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* Bayer was merged into Sterling as of December 31, 1942 (App. 39a).

** Emphasis supplied throughout this brief unless otherwise noted.

It is undisputed that the 1923 Contracts were illegal from their inception under the United States antitrust laws (App. 42a), and they were declared to be so in consent decrees entered in two actions* brought by the Antitrust Division of the Department of Justice against Sterling and certain of its subsidiaries or affiliates (App. 43a, 121a-22a, 130a-31a). Those decrees, entered September 5, 1941, were signed on behalf of the Department of Justice by Thurman Arnold, then Assistant Attorney General in charge of the Antitrust Division and now counsel for Farben (App. 126a, 134a).

Had it been necessary for the protection of the public interest in the restoration of fully competitive conditions to limit in some way Sterling's right to enforce its trademarks, such a provision could readily have been included in the decrees. This was not found necessary, however, and both decrees, as ultimately entered, expressly provided that nothing therein was to

> "* * * affect or diminish any right, title or interest of said defendants * * * in or to or under any heretofore acquired and presently existing * * * trademarks [and] trade names (such as the name 'Bayer' and the 'Bayer Cross' mark and registrations thereof) * * *." (App. 123a, 131a).

That these decrees were comprehensive and in the public interest was expressly recognized at the time of their

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* The consent decree in *United States* v. *Alba Pharmaceutical Co.*, CCH Trade Reg. Rep. (1940-43 Trade Cas.) ¶ 56,150 (S. D. N. Y. 1941) (App. 119a-29a), declared unlawful those two of the 1923 Contracts which were executed between Farben and Sterling and between Farben and Winthrop Chemical Company, Inc. (a New York corporation wholly owned by Sterling). The consent decree entered in *United States* v. *The Bayer Co.*, CCH Trade Reg. Rep. (1940-43 Trade Cas.) ¶ 56,151 (S. D. N. Y. 1941) (App. 129a-35a), declared unlawful the 1923 Contract, referred to above, which was executed between Farben and Bayer.

entry by Mr. Arnold. On September 25, 1941 Mr. Arnold issued a statement with respect to the decrees which said in part:

> "The settlement of this case was eminently satisfactory to me personally and to all the members of my staff who worked on it.
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> • • • • • •
>
> "In this case a consent decree was necessary to invalidate *for all future time the illegal contracts on which the criminal information was founded, to prevent the German Dye Trust* [petitioner's claimed predecessor] *from relitigating the same questions in civil suits between private parties, and to prevent the reestablishment of any future relationship of the same kind between Sterling and the German Dye Trust.*" (App. 10b).

In both cases, jurisdiction was expressly retained by the United States District Court for the Southern District of New York for any appropriate modification of those decrees (App. 125a, 133a-34a). At no time since 1941 has the Department of Justice sought to modify those decrees so as to grant any additional relief against Sterling, as, for example, providing that the trademarks "Bayer" and the "Bayer Cross", which were referred to in those decrees, should not be enforceable against Farben. It is clear from this that, so far as the Department of Justice is concerned, nothing further is necessary to restore the full vigor of competition, and there are no present illegal restraints of trade arising out of the relationship between Farben and Sterling from 1923 to 1941.

Petitioner properly refers (Pet. 27, n. 12) to Wilbur L. Fugate of the Department of Justice as an expert in the field of foreign commerce and the antitrust laws, and quotes an excerpt from a treatise by him pointing out that trade-

mark relief is included in antitrust judgments where it is appropriate to do so. It is of interest that Mr. Fugate has been personally connected with the very case dealing with the 1923 Contracts upon which petitioner relies. It was Mr. Fugate who appeared for the United States in supplemental proceedings which were commenced in 1952 for the purpose of making General Aniline & Film Corporation, an alleged assignee of certain of I. G. Farben's rights under the 1923 Contracts, a party to the 1941 decree, see *United States* v. *The Bayer Co.*, 135 F. Supp. 65 (S. D. N. Y. 1955). Yet at no time since the entry of that decree in 1941 has the Department of Justice moved for any modification thereof in respect of Sterling's trademark rights or charged Sterling with any attempt to enforce any right arising from the 1923 Contracts.

The Writ Should Not Be Granted.

Farben's petition shows, just as did its briefs below, clearly and unequivocally, the essential emptiness of its antitrust suit. Farben's object, as pointed out earlier, is to gain for itself the free use of trademarks which, it was stipulated, have been exclusively used in the United States by Sterling and its predecessors since 1917 (App. 40a). To justify an antitrust suit as a means of pursuing that objective, Farben asserts that Sterling is using those trademarks to exclude Farben from the American market.

This assertion is patently false. It has never been alleged, in the complaint or anywhere else in the record, that Farben cannot sell its products in the United States under other trademarks or that it has ever been prevented from doing so by Sterling.*

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* For example, Verona Pharma Chemical Corporation, a New Jersey corporation of which Farben directly or indirectly owns a

What has been alleged in the complaint is that sales by Farben in the United States without using "Bayer" and the "Bayer Cross" are not "commercially feasible" (App. 18a). What Farben really means is that it cannot do a nationwide business in the United States under other trademarks without incurring the expense of nationwide advertising. To avoid that expense, it is seeking a free ride on the enormous volume of advertising for which Sterling has paid since 1918 to build up consumer acceptance of goods trademarked with "Bayer" and the "Bayer Cross". The petition of course contains pious disavowals (e.g., Pet. 13) of any purpose to profit from the goodwill created by Sterling; the point remains, however, that Farben has no other apparent reason for its desire to use the trademarks.

As the author of the infringing pamphlet involved in *Sterling* v. *Harding*, Civ. Action No. 882-59 (D. N. J.), testified (App. 22b-24b), Farben apparently recognizes that the main obstacle to its entry into the American pharmaceutical market is *not* its inability to use Sterling's trademarks, "Bayer" and the "Bayer Cross". But even if it were, this is a self-imposed handicap. There is nothing in this record to show that when I. G. Farben was dissolved after World War II and certain of its assets turned over to the newly-organized petitioner, the name "Farbenfabriken Bayer A.G." was anything but a matter of voluntary choice. It is simply not credible that this choice was made in ignorance of the American trademark situation. Thus, to the extent

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majority interest, is engaged in the manufacture and distribution of drugs, pharmaceuticals and related products in the United States. In addition, The New York Times reported on October 17, 1961 (p. 60, col. 5) that Farben had caused the incorporation of another subsidiary, called F. B. A. Pharmaceuticals, Inc., to develop, manufacture and market ethical pharmaceutical specialties in the United States for Farben.

that inability to use "Bayer" and the "Bayer Cross" in the American market is an obstacle to petitioner's entry into that market, it is entirely a self-created obstacle.

Farben apparently has no quarrel with the holding of the District Court that an overt act is necessary to support a private action alleging an unlawful conspiracy under the antitrust laws. And Farben nowhere takes specific issue with the rule applied by that court that the ownership, use and assertion of registered trademarks does not supply the overt act. However, Farben finds that it cannot allege any other measure which could conceivably supply the missing overt act since 1923, which date is well beyond the period prescribed by the statute of limitations and the doctrine of laches. Consequently, Farben has sought to convert Sterling's subsequent exercise of its trademark rights against Farben into overt acts within the two-year statutory period by associating those rights with ancient illegal agreements.

Farben does this by charging that it and Sterling, or their predecessors, have on two occasions been parties to agreements dealing with the trademarks, and that Sterling's power to exclude Farben by asserting the trademarks against it has arisen from one or the other of those occasions. Since the series of contracts executed in 1923 was concededly illegal as containing a territorial allocation of markets (achieved in part, according to Farben, by a corresponding allocation of trademark rights*), Farben insists (Pet. 19-20) that the exercise, 20 years after termination of those agreements, of any power derived therefrom must be similarly unlawful. Alternatively, it is declared (Pet. 21), if the power to exclude was derived from the

* As shown, *infra*, the illegality of the 1923 Contracts existed entirely independent of any provision relating to trademarks.

earlier 1913 agreement, then that agreement also established a division of markets and it, too, is unlawful.

Neither contention is sound.

I.

The right to assert the trademarks against Farben was acquired by Sterling with its purchase of Bayer in 1918.

Sterling traces all of its rights in the trademarks to its 1918 purchase of Bayer, in whose name the trademarks were then registered. Under section 12 of the Trading with the Enemy Act, 40 Stat. 423 (1917) (amended by 40 Stat. 460 (1918)), as amended, 50 U. S. C. App. §12 (1958), the Alien Property Custodian was empowered to sell the American subsidiary as fully as could its prior enemy owner. Consequently, Sterling acquired with those trademarks the right of their exclusive use, even against Bayer's former parent.

If Farben and Sterling had negotiated the sale of Bayer directly between themselves, it is clear that by that sale Sterling would have acquired the exclusive right which is now challenged. This proposition is established by the Court's decision in *A. Bourjois & Co.* v. *Katzel*, 260 U. S. 689*. In that case, certain French manufacturers of face powder had sold their United States business, together with specific registered trademarks (including those there in issue) and goodwill, to plaintiff. Plaintiff then registered the same trademarks in its own name and continued the business, using the trademarks and the same form of box and label.

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* And *see Roger & Gallet* v. *Janmarie, Inc.*, 245 F. 2d 505 (C. C. P. A. 1957).

Defendant purchased a quantity of the same face powder from the French manufacturers and sold it in the United States in the latter's boxes, which resembled those used by plaintiff and bore similar trademarks.

In an action to restrain infringement, the District Court granted a preliminary injunction. This action was reversed by the Court of Appeals but restored by this Court, which said:

> "We are of opinion that the plaintiff's rights are infringed. After the sale the French manufacturers could not have come to the United States and have used their old marks in competition with the plaintiff. That plainly follows from the statute authorizing assignments. Act of February 20, 1905, c. 592, §10, 33 Stat. 727. If for the purpose of evading the effect of the transfer, it had [been] arranged with the defendant that she should sell with the old label, we suppose that no one would doubt that the contrivance must fail. There is no such conspiracy here, but, apart from the opening of a door to one, the vendors could not convey their goods free from the restriction to which the vendors were subject. Ownership of the goods does not carry the right to sell them with a specific mark." (260 U. S. at 691-92).

Defendant had argued that the trademark really belonged to the French manufacturers and indicated the French origin of the products.* This Court responded:

> "But that is not accurate. It is the trademark of the plaintiff only in the United States and indicates in law, and, it is found, by public understanding, that the goods come from the plaintiff although not made by it. It was sold and could only be sold with the good will of the business that the plaintiff bought.

* Farben makes a similar contention (Pet. 15).

> *Eiseman* v. *Schiffer*, 457 Fed. 473. It stakes the reputation of the plaintiff upon the character of the goods. *Menendez* v. *Holt*, 128 U. S. 514." (*Id.* at 692).

Although the *Bourjois* decision dealt with the voluntary, negotiated sale by a foreign parent of its American business, it is clear that the same result is reached where seizure and sale has been made by the Alien Property Custodian.

As the Court of Appeals noted, it was the unmistakable intention of Congress to empower the Alien Property Custodian to sell property as fully as the previous owner could. Section 12 of the Trading with the Enemy Act, *supra*, provides:

> "The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property * * * which has been or shall be * * * assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, * * * shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof * * *."

The Court of Appeals also quoted another section of the Act, which demonstrates the intention of Congress to give finality to all sales by the Alien Property Custodian:

> "The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the

> event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States." (40 Stat. 416 (1917) (amended by 40 Stat. 1020 (1918)), as amended, 50 U. S. C. App. §7(c) (1958)).

In interpreting these provisions of the Trading with the Enemy Act, the decision below is in harmony with a decision from another Circuit, *Koppel Industrial Car & Equipment Co.* v. *Orenstein & Koppel A. G.*, 289 Fed. 446 (2d Cir. 1923).

In the *Koppel* case, defendant, a German corporation, had conducted an extensive railroad supply business in the United States prior to World War I under the name Orenstein-Arthur Koppel Company, and under the registered trademark "OAK." Both the corporate name and the trademark were used to describe defendant's business in all English-speaking countries. Defendant's entire American business was vested by the Alien Property Custodian and thereafter sold to plaintiff.

After the war, defendant changed its own name from Koppel-Orenstein & Koppel and Orenstein & Koppel, Limited to Orenstein and Koppel A. G., which the court thought to be an attempt to approximate the name under which it had conducted its pre-war American business. Defendant then set about rebuilding that business, representing that it was the successor to Orenstein-Arthur Koppel Company, using the trademark "OAK", and selling the same products to the same customers from offices in the same building as before the war.

The court held that, under the Trading with the Enemy Act, the Alien Property Custodian had power to sell enemy property as fully and as completely as could the former

owner. Since such former owner, after a voluntary sale, could not have later sought to impair the goodwill sold by it, a similar course of action was also barred after sale of the business by the Alien Property Custodian. Said the court:

> "*It was the apparent intention of Congress to sell enemy property as fully as the owner thereof could sell.* This was deemed necessary as a war measure. In the case of a going concern, which owned good will or trade-marks, it was clearly intended that these concerns should be kept going in order to engage in manufacturing or other enterprises which might be needed for the welfare of our country during this period; and it had the other purpose of crippling the enemy to the extent of preventing the enemy from enjoying its property or its profits during such period. Likewise, it was the intention of Congress that the American citizen, who was authorized to purchase at public sale, should, if the terms of sale so provided, be able to buy and enjoy his purchase as a going concern, thereby obtaining all that the German proprietorship consisted of at the time of sale. The language of the Trading with the Enemy Act clearly embraces this power of sale. To permit of the sale of the physical property only would have deprived the purchaser in the instant case of the great value of the good will of the German corporation, which had made its business and its growth during the preceding years. The conveyance by the bill of sale as referred to, conveyed 'the business as a going concern and the good will,' together with 'all registered and unregistered trade-marks * * * trade-names and the like,' and 'all privileges, franchises, and rights of every kind,' owned by the German corporation and its subsidiaries in the United States.

"We think this conveyed to the purchaser the exclusive right to carry on the business in the United States, with the right of protection of a court of equity from interference by the German corporation; for, if the present interference be permitted, what was conveyed would in time be destroyed. *The sale was as complete as if it were a voluntary conveyance of its interests in the United States by the German corporation.* It is not the case of a sale *in invitum* of the good will and business. Assuming a voluntary sale of its good will and business had been made by the German corporation, would it have been at liberty later to impair the good will by seeking the customers of the buyer and carrying on business, using substantially the same trade-name and trade symbol as they had theretofore used? We think not." (289 Fed. at 450-51).

II.

Sterling's right to assert its trademarks against Farben is therefore independent of the 1923 Contracts.

The basis of Farben's theory of its rights, as that theory is now stated, is that before 1923 Farben retained a right of concurrent use of "Bayer" and the "Bayer Cross", and that Bayer therefore had no right to assert the trademarks against its former parent (Pet. 10, 19).

This novel theory was not alleged in the complaint (App. 6a-21a). Moreover, it is simply without support, either in fact or in law.

Farben cannot claim that a right of concurrent use arose from actual concurrent use, since it has never alleged that either of the present petitioner's alleged predecessors ever used those trademarks in the United States. In fact, it has specifically declined to do so (App. 40a).

On the other hand, if Farben claims a constructive right of concurrent use, there is still no cause of action created under the antitrust laws. At most, Farben raises questions of trademark law or of the powers of the Alien Property Custodian.

Contrary to Farben's position, the 1923 Contracts themselves recognized that the trademarks were then owned by Bayer. The third recital in the agreement between Farben and Bayer (App. 58a-75a) stated as follows:

> "And Whereas New York are the proprietors of various trade marks in the United States of America including the name 'Bayer' and the 'Bayer Cross' mark as applied to various products * * *." (App. 58a).

What Farben complains of in the present litigation is the assertion by Sterling of certain rights arising from its exclusive and unchallenged ownership of two United States trademarks which have been registered in the name of Sterling or its predecessors since 1908 (App. 40a).

Sterling does not now base, nor has it at any time based, its claim of ownership of "Bayer" and the "Bayer Cross", and its claim to protection under the trademark laws, upon any provision of the 1923 Contracts. If it were to do so, it would be arguing that the remedy which Farben seeks is barred by an undertaking such as the following, which appears in the same agreement as referred to above:

> "Leverkusen [Farben] agree not to contest or in any way directly or indirectly put in issue the title of New York to their business property or rights including any of the said trade marks registered in the name of New York or used by New York or the exclusive right of New York to the name of Bayer and the Bayer Cross mark as applied to the said

> products in the United States of America, Canada, the United Kingdom and Ireland or in Cuba." (App. 59a).

At no time has Sterling relied on this or any similar provision. All that Sterling asserts in its counterclaim in this case and all that it asserted (App. 20b-25b) in *Sterling v. Harding, supra,* are the trademark rights which it has by reason of its purchase of Bayer from the Alien Property Custodian in 1918 (App. 40a), and the protection to which it is entitled by reason of almost 45 years of uninterrupted ownership and use.

Farben is totally unable to point to any express assertion by Sterling of rights under the 1923 Contracts. Its petition contains only such vague generalizations as the following:

> "Sterling acquired the right to restrain such competition only through the illegal uses made of these trademarks under the 1923 agreements. * * *
>
> "Sterling's power to restrict competition by German Bayer is because of these illegal agreements, substantially greater today than it would have been had the illegal agreement not been concluded but German Bayer had exercised its right to compete on the American market. * * *" (Pet. 19).

No support for these assertions is presented and no support exists.

If, by asserting rights accruing through ownership and use of the trademarks, Sterling were somehow asserting rights under the 1923 Contracts, Sterling would be guilty of contempt of the 1941 consent decree. That decree declared the 1923 Contracts illegal and enjoined Sterling from enforcing any of their provisions (App. 130a-31a). Yet, during the more than 20 years that have elapsed since

entry of that decree, Sterling at no time has been charged by the Department of Justice with a violation of its provisions.

On the contrary, in the only subsequent proceedings relating to that decree, the Department of Justice made it clear that it was not charging Sterling with a violation of its provisions. During the oral argument on January 8, 1952 of a motion by the United States for leave to make General Aniline & Film Corporation, an alleged assignee of certain of I. G. Farben's rights under the 1923 Contracts, a party to the decree, see 135 F. Supp. 65 (S. D. N. Y. 1955), Wilbur L. Fugate, Esq., representing the Department of Justice, stated:

> "The present proceeding is not for the purpose of changing or modifying the final judgment in this case in any particular but on the contrary, it is to protect that judgment.
>
> "This proceeding is not brought because of anything the present defendants [Bayer and Sterling] have done and no other or additional relief is sought in this action." (Transcript, p. 3).

III.

Farben's claims are barred by the statute of limitations and the doctrine of laches.

Even if, as Farben contends (Pet. 10, 19), its predecessor had a right of concurrent use of the trademarks during the period from 1918 to 1923, Farben still cannot prevail. Farben's complaint admits (App. 17a-18a), as the District Court carefully noted (App. 34a, 36a-37a; Pet. App. 4b, 7b), that the exclusion which it alleges to exist today is precisely the same as that which it claims was imposed by the 1923 Contracts (see App. 14a). Accordingly, as the

District Court held (App. 34a 36a-37a; Pet. App. 4b, 7b), any damage suffered by Farben resulted from events transpiring not later than 1923. Since no overt act has been alleged since then, Farben's action, brought 32 years later in 1955, is barred by the statute of limitations and the doctrine of laches.

This case shows very clearly the wisdom of those rules, whose purpose is to prevent the assertion of claims so old that they are difficult or even impossible to prove or disprove. In presenting its case, Farben's petition relies on an alleged inability, a half century after the fact, to prove execution of the 1913 agreements.

Further, this case is a dramatic example of the injustice which is threatened by the assertion of stale claims. Farben would have this Court completely ignore the enormous expenses incurred by Sterling in creating consumer acceptance of "Bayer" and the "Bayer Cross" since 1918 and the reliance of thousands of investors in Sterling's common stock, which since 1922 has been listed on the New York Stock Exchange, upon Sterling's continued exclusive ownership of those trademarks.

IV.

The decisions below do not conflict with this Court's decision in *Timken*.

Farben would have the Court believe that Sterling obtained the trademark rights it is now asserting from the 1923 Contracts, and that this is the principal reason those agreements were illegal. Such is not the case. Those agreements were illegal, not because they dealt with trademarks, but because they divided the markets of the world in pharmaceuticals and many other products. That the illegality inhered in the territorial allocations rather than the trade-

mark provisions of these contracts was recognized in the consent decrees which expressly declared that nothing therein was to

> "affect or diminish any right, title or interest of said defendants * * * in or to or under any heretofore acquired and presently existing * * * trademarks [and] trade names (such as the name 'Bayer' and the 'Bayer Cross' mark and registrations thereof) * * *." (App. 123a, 131a).

The same point was noted by the District Court with respect to these very contracts in the later proceedings relating to General Aniline & Film Corporation, *supra:*

> "Finally, although the preamble clauses recite that the agreement is intended to settle trademark disputes between the parties, a fair reading of the related covenants of the agreement establish that their dominant purpose was to divide the world market among the participants." (135 F. Supp. at 70).

The asserted conflict between the decisions below and *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, simply does not exist. The gravamen of the antitrust violation in *Timken* was an international division of markets, just as in the 1923 Contracts. Nothing in *Timken* suggests, however, as now contended by Farben, that it is an automatic and *per se* violation of the antitrust laws for one corporate entity to own and be free to assert a trademark in the United States, and for another corporate entity to own and be free to assert the same trademark in certain European countries. The evil arises when by contract or other agreement (but not in the 1923 Contracts) those trademarks are utilized as a device for elimination of competition between the two trademark owners.

Farben argues (Pet. 20-21) that, if Sterling is entitled to assert the trademarks against Farben (and hence, allegedly, to exclude Farben from the American market) independently of the 1923 Contracts, it must have acquired this right as a consequence of the 1913 agreement coupled with its 1918 purchase of Bayer. Therefore, it is urged, the 1913 agreement effected a division of markets as unlawful under *Timken* as that established in 1923 and the exercise of any rights thereby acquired must be enjoined.

Again, the arrangement that was before this Court in the *Timken* case was far different. The 1913 agreement between the predecessors of the present parties was a simple, straightforward sale of trademarks incident to the transfer of a going business. The *Timken* case is of course no authority for the proposition that all sales of trademarks are illegal under the antitrust laws.

V.

The decisions below do not conflict with the decision of the Court of Appeals for the Second Circuit in *Koppel*.

Neither a later opinion of the Court of Appeals for the Second Circuit in the *Koppel* case, 25 F. 2d 716 (1928), nor *American Bosch Magneto Corp.* v. *Robert Bosch Magneto Co.*, 127 Misc. 119, 215 N. Y. S. 387 (Sup. Ct. N. Y. Co. 1926)*, involved a charge on the part of the German company that the American company was guilty of violating the antitrust laws by asserting its trademarks against its former parent, nor, in fact, did either case involve any charge at all under the antitrust laws. Accordingly, the nature and scope of the relief granted there is not relevant here.

* Cited in Note 11 (Pet. 24).

VI.

The decisions below do not conflict with the policy of the antitrust laws; the remedy sought by Farben is not within their scope.

Even assuming that, as Farben contends, the trademark rights which Sterling asserts today arose only from the 1913 agreement or the 1923 Contracts, it is plain that Farben is not entitled to the relief which it seeks. This Court has held that the only sanctions available in private actions under the antitrust laws are those which were specifically provided by Congress, *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743.

Nowhere in the antitrust statutes is there any provision which even remotely sustains the remedy of a free compulsory license under a trademark in a private antitrust action. Sterling knows of no decision which has awarded such a remedy, and none has been cited by Farben. To the contrary, that remedy has already been specifically rejected by several of the District Courts, *Cott Beverage Corp.* v. *Canada Dry Ginger Ale*, 146 F. Supp. 300 (S. D. N. Y. 1956); *F. A. D. Andrea, Inc.* v. *RCA*, 14 F. Supp. 226 (D. Del. 1936), *aff'd*, 88 F. 2d 474 (3d Cir. 1937), *cert. denied*, 300 U. S. 681; *RCA* v. *Hygrade Sylvania Corp.*, 10 F. Supp. 879, 883 (D. N. J. 1934).

The authorities cited by Farben (Pet. 25-27) all involve antitrust actions brought by the United States Government; none involved, as here, a private antitrust action.

VII.

The decision below is not a denial of due process.

The last argument made in the Petition (Pet. 27-31) is that the Court of Appeals relied, in affirming the grant of Sterling's motion for summary judgment, on the provisions of contracts whose execution and performance had not been proved but had been conceded by Farben solely for purposes of its own motion for summary judgment.

First, it is not at all clear whether Farben did impose such a limitation on its concession in the Court of Appeals. Its main brief, while referring to the agreements on several occasions (Br. 18, 20, 21), made no reservation concerning their execution and performance. Its reply brief contains a footnote declaring that execution had not been proved (Br. 10) but, in a course of argument applicable to Sterling's motion as well as Farben's motion, treats the agreements as if they had nevertheless been performed (Br. 10-12).

Second, as pointed out earlier, Sterling traces its ownership of the trademarks to its purchase of Bayer from the Alien Property Custodian in 1918. It submits that by that purchase it acquired rights to the trademarks as full and complete as Farben itself could have voluntarily conveyed and that the execution or non-execution, and performance or non-performance, of the 1913 agreements are not material.

Conclusion.

For the reasons stated, the writ should be denied.

Respectfully submitted,

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January 10, 1963.

APPENDIX A.

UNITED STATES DISTRICT COURT,
DISTRICT OF NEW JERSEY

Opinion.

(Filed July 15, 1957)

WILLIAM F. SMITH, District Judge.

This is a civil action under the antitrust laws, and particularly Section 1 of the Sherman Act, as amended, 69 Stat. 282, 15 U. S. C. A. §1, and Sections 4 and 16, of the Clayton Act, 38 Stat. 731 and 737, 15 U. S. C. A. §§15 and 26. The action is brought by the plaintiff, a corporation organized under the laws of Germany, as the "legal successor in interest" to certain rights of Farbenfabriken vorm. Friedrich Bayer and Company, *et als.* The latter is hereinafter identified as "Friedrich Bayer and Company." The Complaint charges that the defendant and others, not named as defendants, are, and have been since 1918 engaged in a conspiracy in restraint of trade to the injury of the plaintiff. The plaintiff seeks to enjoin the alleged illegal restraint of trade and to enforce its claim for treble damages.

The defendant filed an answer in which it interposed as affirmative defenses: first, the bar of the statute of limitations, and second, the failure of the complaint to state a claim upon which relief can be granted. The defenses are raised at this time on the dual motion of the defendant, to wit, a motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure, 28 U. S. C. A., and a motion for summary judgment under Rule 56(b) of the Federal Rules of Civil Procedure, *supra.* The arguments advanced by the defendant in support of the motion are directed primarily to the allegations of the complaint.

These motions, although cast in the form of motions for judgment under the said rules, we shall treat as appropriate motions to dismiss the complaint on the grounds stated.

COMPLAINT.

The complaint alleges generally that the defendant, and others not named, are, and have been, engaged in a con-

spiracy in restraint of trade in violation of the antitrust laws to the injury of the plaintiff. This general allegation, which pervades the complaint, is supported by specific allegations contained in 51 paragraphs. It should be noted that many of the paragraphs contain nothing more than a recital of the history of the plaintiff and its predecessors; this recital is relatively unimportant at this time. The essential allegations of the complaint may be briefly summarized. The references hereinafter made to the plaintiff and defendant may be regarded as including their predecessors, except where it is otherwise noted.

The complaint alleges that: (1) The plaintiff and defendant are, and have been, engaged in the manufacture, sale and distribution of similar drugs and pharmaceutical products; (2) the defendant is, and has been, so engaged within the United States and in various other parts of the world; (3) the defendant is, and has been, directly and indirectly engaged in interstate and foreign commerce; (4) the plaintiff is, and has been, similarly engaged, except to the extent that its commerce within the United States is, and has been, limited by the alleged illegal restraints imposed upon it by the conduct of the defendant; (5) the defendant, by its conduct restrains, and has restrained, the plaintiff's entry into such commerce within the United States "to the extent necessary to permit a commercially feasible operation in the field of drugs and pharmaceuticals"; (6) the defendant, pursuant to and in furtherance of a conspiracy in restraint of trade, has gained complete control of a "substantial segment of the * * * market in the products" developed and produced by the predecessors of the plaintiff, to wit, Friedrich Bayer and Company and its subsidiary Bayer Co., Inc., of New York; (7) the defendant, in violation of the antitrust law, excludes, and has excluded, the plaintiff from the commercial market within the United States. The allegations herein summarized, couched in the most general terms and not particularized, are contained in paragraphs 1 to 12, inclusive, of the complaint.

The complaint further alleges that: (1) with the advent of the First World War, the Alien Property Custodian seized the assets of Friedrich Bayer and Company, includ-

ing the stock of its wholly owned subsidiary Bayer Co., Inc., of New York; (2) these assets, including the aforesaid stock, were sold to Sterling Products, Inc., a predecessor of the present defendant; (3) the predecessor of the present defendant thus acquired the ownership and control of certain trademarks, including the well-known "Bayer Cross" and the trade name "Bayer"; (4) thereafter, between 1920 and 1923, the predecessors of the present litigants negotiated and executed certain contracts under which the predecessor of the defendant acquired certain rights, including trademarks, patents and secret processes not identified in the complaint; (5) these contracts, concluded in 1923, were negotiated and executed by the predecessors of the plaintiff under "economic duress"; (6) the predecessor of the defendant registered the trademarks, acquired from the Alien Property Custodian, in the United States and in other countries.

The complaint further alleges that: (1) the contracts of 1923 were illegal and an imposition on the plaintiff's predecessors; (2) the defendant's predecessor acquired under these contracts complete control of trademarks, patents and secret processes theretofore owned by the plaintiff's predecessors; (3) the defendant and its predecessor, by its ownership and use of the trademarks, patents and secret processes thus acquired, are, and have been, in such control as to exclude the plaintiff and its predecessors from the commercial market within the United States; (4) the exclusion is, and was, "as effective as it had been under the illegal agreements of 1923." The specific charge, as we construe the allegations of the complaint, is that the defendant, having gained control of the commercial market by its acquisition of trademarks, patents and secret processes, continues to exercise that control, and, by the exercise of that control, excludes, and has excluded, the plaintiff and its predecessors from the commercial market within the United States.

The contracts, to which reference is hereinabove made, are not before the Court, but it is conceded that these contracts were held to be in violation of the antitrust laws in a final judgment entered in the United States District Court,

Southern District of New York, on September 5, 1941 (United States *v.* Alba Pharmaceutical Company, Inc., *et al.*, Civil Action No. 15-363). The present defendant was a party to that action and consented to the entry of the final judgment.

We shall assume for the purpose of discussion, but without deciding the general issue raised by the pleadings, that the conspiracy in restraint of trade, as charged in the complaint, existed, and that the conduct of the defendant and its predecessor, prior to 1941, was in furtherance of that conspiracy. This assumption is necessary if the allegations of the complaint are to be viewed in the light most favorable to the plaintiff, a course which must be adopted at this stage of the proceedings.

There is no specific allegation in the complaint that subsequent to 1941 the defendant committed any overt act in furtherance of the alleged conspiracy. There is a general allegation that the plaintiff and its predecessors have been excluded from the commercial market within the United States since 1949 but this alleged exclusion, as we view it, cannot be regarded as an overt act; it must be regarded as the consequence of the earlier conduct of the defendant and its predecessor, the injury of which the plaintiff complains and for which it seeks redress in this action.

If the exclusion of the plaintiff and its predecessors from the commercial market in the United States is ascribable to the conduct of the defendant and its predecessor, it is ascribable solely to the conduct of the defendant and its predecessor between 1918 and 1941. The exclusion, if it existed, became effective in 1923, when the agreements were concluded, and continued thereafter without any affirmative act by the defendant or its predecessor. It is not without significance that the plaintiff itself charges that the restraint of trade is, and was, occasioned by the earlier conduct of the defendant and its predecessor, particularly the acquisition of the trademarks, patents and secret processes, under the alleged illegal contracts.

There is a further allegation which should be considered. It is alleged in paragraph 47 that: "During 1954 and

1955 Sterling attempted by threats and intimidation to obtain from Bayer a waiver of its legal rights." It is further alleged "Bayer resisted all pressures. It refused to accede to demands to exclude it. It refused to acquiesce in the continuance of Sterling's monopoly and restraint against it." There is no allegation that the intimidation was the proximate cause of any injury to the plaintiff. Therefore, even if we regard it as an overt act, it is not such an overt act as will support a claim for damages. This conclusion, we believe, is supported by our later discussion. We are of the opinion that the allegation is mere surplusage.

Claim for Damages

The defendant contends that the plaintiff's claim for damages is barred by the applicable statute of limitations. The pertinent provisisons of the statute upon which the defendant relies, read as follows: "Every action at law * * * for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this title, * * * shall be commenced within 6 years next after the cause of any such action shall have accrued." N. J. S. 2A:14-1, N. J. S. A. 2A:14-1. The statute is applicable but it is necessary that we determine when the cause of action accrued.

A civil action for conspiracy is essentially an action in tort. It is well established that such an action cannot be maintained in the absence of: first, the overt act of one or more of the conspirators in the furtherance of the conspiracy; and second, the consequential damage to the rights of another of which the overt act is the proximate cause. The gravamen of the action lies not in the conspiracy but in the overt act. A cause of action accrues upon the commission of an overt act followed by damage to another of which the overt act is the proximate cause. The statute of limitations runs from the commission of the last overt act alleged to have caused damage. Park-in Theatres *v.* Paramount-Richards Theatres, D. C., 90 F. Supp. 727, affirmed 3 Cir., 185 F. 2d 407, certiorari denied 341 U. S. 950, 71

S. Ct. 1017, 95 L. Ed. 1373; see also: Northern Kentucky Tel. Co. *v.* Southern Bell T. & T. Co., 6 Cir., 79 F. 2d 333, 335, 97 A. L. R. 133, certiorari denied 294 U. S. 719, 55 S. Ct. 546, 79 L. Ed. 1251; Steiner *v.* 20th Century-Fox Film Corporation, 9 Cir., 232 F. 2d 190, 194-195. The victim of the conspiracy may continue to suffer damage long after the last overt act has been committed, but, if he is to preserve his cause of action, he must commence suit within the period defined by the applicable statute of limitations. *Ibid.*

The rule is discussed in Steiner *v.* 20th Century-Fox Film Corporation, *supra.* The language of the Court is apposite. It is therein stated, 232 F. 2d at page 194: "The question: When does the statute of limitations begin to run? points to the first problem which must be here resolved. Appellant contends that where damages are in their nature continuing the statute runs from the date of the last injury. Under this view the statute of limitations would not run until all injury to a claimant had ceased. We must disagree. In a civil conspiracy, the statute of limitations runs from the commission of the last overt act alleged to have caused damage." (Citations omitted.)

It is further stated in the opinion of the Court, 232 F. 2d at page 195: "In a continuing conspiracy causing continuing damage without further overt acts, the statute of limitations runs, as we have noted, from the time the blow which caused the damage was struck. Any further internal injury affects the problem of how much should be claimed in damages, not the problem of when the statute of limitations commences to run. Otherwise, in a continuing conspiracy, the cause of action of an injured party would never fully develop, nor would there be any limitation upon the right of action, and the beneficent purpose of the statute to delimit the right to sue would be defeated." (Citations omitted.)

The plaintiff contends that it seeks to recover only those damages which it has sustained within the six year period next preceding the commencement of the action. These damages are not recoverable in the absence of a

specific allegation that they were proximately caused by an overt act committed within the same period. The complaint fails to allege such an overt act.

These damages, if we interpret the allegations of the complaint correctly, are ascribed by the plaintiff to the conduct of the defendant prior to 1941, and particularly its conduct between 1920 and 1923, when, it is alleged, the defendant illegally acquired the trademarks, patents and secret processes theretofore owned by the plaintiff's predecessors. It should be noted that the Court is unable to fix with certainty the date of the last overt act but this is due entirely to the complete lack of particularity in the complaint. There is no allegation, however, that the defendant committed any overt act in furtherance of the conspiracy after 1941.

There is a general allegation that the plaintiff is, and has been, excluded from the commercial market within the United States, but this exclusion has been effective, according to the allegations of the complaint, since 1923. This exclusion, we have heretofore held, was not an overt act but the consequence of the earlier conduct of the defendant and its predecessor, the injury of which the plaintiff complains and for which it seeks redress.

We are of the opinion that the claim for damages here asserted by the plaintiff is barred by the statute of limitations for the reasons hereinabove discussed.

The defendant further contends that the complaint should be dismissed because of its failure to state a claim upon which relief can be granted. This contention is meritorious. We are of the opinion that in a civil action for conspiracy the complaint should *Allege With Particularity* an overt act within the period defined by the statute of limitations. Since the gravamen of the action is the overt act, the allegation of an overt act within the said period is essential to the statement of a claim for relief. There is no such allegation in the present complaint.

The claim for damages will be dismissed for the reasons hereinabove discussed, but without prejudice to the right of the plaintiff to apply to the Court for leave to file an

amended complaint. This should not be interpreted as an open invitation to merely redraft the allegations contained in the present complaint. An amended complaint will not be entertained unless the plaintiff can aver with particularity an overt act within the statutory period.

THE CLAIM FOR EQUITABLE RELIEF.

The bar of the statute of limitations may not be invoked as a defense against the plaintiff's claim for equitable relief. The statute of limitations, by its express terms, applies only to actions at law.

There remains for consideration, however, the motion of the defendant to dismiss the complaint for failure to state a claim upon which relief can be granted. The claim for equitable relief may appear to rest on rather tenuous grounds, but at this stage of the proceeding the complaint must be viewed in the light most favorable to the plaintiff and should not be dismissed "unless it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of [its] claim." Frederick Hart & Co. *v.* Recordgraph Corporation, 3 Cir., 169 F. 2d 580, 581. We are of the opinion that the complaint, tested by this standard, is sufficient to withstand the present attack. The motion to dismiss the complaint on the ground stated will, therefore, be denied.

We observe that the complaint charges in the most general language: first, that the defendant and others not named, are, and have been, engaged in a conspiracy in restraint of trade, in violation of the antitrust laws, to the injury of the plaintiff; second, that the defendant has gained control of the commercial market within the United States by its acquisition of trademarks, patents and secret processes in furtherance of the conspiracy; and third, that the defendant, by the exercise of this control, excludes the plaintiff from the said market. These charges are clothed in descriptive language which adds nothing to the essential allegations of the complaint. We are of the opinion that in the interest of orderly procedure the plaintiff should file with the

Court, and serve upon the defendant, a more definite statement. This should be done at least thirty days in advance of the pretrial conference, if not sooner.

The more definite statement should contain: first, adequate references to the particular patents relied upon, together with their date of issuance; second, a description of the trademarks sufficient to identify them; third, a description of the secret processes sufficient to identify them; fourth, a statement of the manner in which the plaintiff is alleged to have acquired ownership of the aforesaid, whether from the Alien Property Custodian or under the contracts referred to in the complaint; and fifth, such other factual information as may assist in defining the issues with particularity.

Motion to Stay Taking of Depositions.

The motion of the defendant to stay the taking of depositions is dismissed.

Application for Counsel Fees.

The attorneys for the plaintiff have applied to the Court for an allowance of counsel fees to be assessed against the defendant. This application is denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 653

FARBENFABRIKEN BAYER A.G., *Petitioner*

v.

STERLING DRUG, INC., *Respondent*
(Antitrust case)

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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January 17, 1963

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Respondent's brief in opposition to the petition helps to crystallize the important issues presented by this case.

1. Conflict With *Timken*

Respondent contends that the only illegal aspect of the 1923 agreements was the fact that they divided world markets (R. Br. 23-25). It claims that the use or allocation of trademarks to effectuate that purpose was not illegal. In this it relies on this Court's decision in *Timken Roller Bearing Co.* v. *United States*, 341

U.S. 592. This, however, is not the way petitioner understands *Timken* which states that "a trademark cannot be used illegally as a device for Sherman Act violations." *Id.* at 599. In any event, it is an important question for this Court to decide, whether such use of trademarks is consistent with the antitrust laws. If it is, then world markets may freely be divided by the use of trademark registrations.

2. Conflict With *Orenstein-Koppel*

Respondent does not dispute that the decision in *Koppel Industrial Car & Equipment Co.* v. *Orenstein & Koppel Aktiengesellschaft et al.*, 25 F. 2d 716 (2d Cir. 1928) permitting the German Orenstein-Koppel company to compete with its former American subsidiary under the Orenstein-Koppel name was based on antitrust considerations. Nor has it even attempted to show why the same antitrust considerations should not have been controlling here. It merely states the obvious and undisputed fact that the *Orenstein-Koppel* case was an unfair competition case and not an antitrust case. The conflict between these cases plainly requires resolution by this Court.

3. Denial of Relief Contrary to Antitrust Policy Expressed in *Timken* and *Orenstein-Koppel* and as Implemented by the Department of Justice

Petitioner in this case is asking for relief almost identical to that which was incorporated by the Government in the amended Consent Decree entered in *American Bosch Corporation*, Civil Action 20-164 (S.D.N.Y. 1942). (See Petition, p. 26)

The Department of Justice obviously would not include such a provision in order to give German Bosch

a free ride on the good will of American Bosch, as respondent claims petitioner seeks here (R. Br. 12) but only to lift a barrier to competition and to implement the same antitrust policies expressed by this Court in *Timken* and by the Second Circuit in *Orenstein-Koppel*. The relief sought by petitioner would, of course, be subject to the same safeguards against confusion between the products of German Bayer and New York Bayer as the Government thought proper to include in the *Bosch* decree.

Respondent does not attempt to dispute the parallel nature of this case and the *Bosch* case. It simply contends that relief of this kind has never been granted in a private antitrust case. If that is so, then this is a good reason why it is important for this Court to review this case. The reason such relief is granted in a Government case is to restore competition. It is the same policy which is implemented when similar relief is granted to a private party.

4. Denial of Due Process

Respondent, by its silence, concedes that the action of the Third Circuit in basing its decision on purported agreements whose execution and performance had been conceded by petitioner only for purposes of its own motion for summary judgment violated the due process requirements laid down by this Court in *Fountain* v. *Filson*, 336 U.S. 681 and is in direct conflict with the decision of the Sixth Circuit in *Regnaud* v. *White*, 170 F. 2d 323. Respondent does not dispute that the petitioner in the District Court clearly limited its concession with respect to these purported agreements in its motion for summary judgment. Respondent merely contends that petitioner did not continually

raise this point in the Court of Appeals but that it did so only on one occasion. Petitioner in its Reply Brief wherein it discusses these purported agreements plainly states at p. 10, Fn. 3:

> "Although there is no proof that these agreements were ever executed plaintiff *for purposes of its motion for summary judgment,* assumes that these were executed."

This violation of due process is such departure from the "accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision". Rule 19(b) of the Rules of this Court.

CONCLUSION

This case presents important issues. The decision below is in conflict with the decisions of this Court and that of another circuit. It should be reviewed by this Court.

Respectfully submitted,

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